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No. 09-09-49

In The

Supreme Court of the United States

PAVEL IVANOVICH LAZARENKO,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. IS THE OMISSION OF AN ELEMENT OF A CRIMINAL OFFENSE FROM A FEDERAL INDICTMENT – HERE, THAT A SPECIFIED UNLAWFUL ACTIVITY MUST VIOLATE FOREIGN LAW – STRUCTURAL ERROR?

II. MAY A FOREIGN HEAD OF STATE BE CONVICTED OF MONEY LAUNDERING BASED ON PURPORTED BRIBES RECEIVED ON FOREIGN SOIL, WHEN AMERICAN GOVERNMENT OFFICIALS HAD FORMALLY STATED THAT SUCH CONDUCT WAS NOT THEN WITHIN THE SCOPE OF THE MONEY LAUNDERING STATUTES?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Pavel Lazarenko respectfully prays that a Writ of Certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit entered on April 10, 2009.

CITATION OF OPINION BELOW

The published opinion of the United States Court of Appeals for the Ninth Circuit is reproduced at Appendix ("App.") 1-47. The official reporter citation of the opinion is *United States v. Lazarenko*, 564 F.3d 1026 (9th Cir. 2009).

STATEMENT OF JURISDICTION

On September 26, 2008, a three-judge panel of the United States Court of Appeals for the Ninth Circuit issued a published opinion affirming some of petitioner's criminal convictions. *United States v. Lazarenko*, 546 F.3d 593 (9th Cir. 2008). Petitioner filed a timely petition for panel rehearing and rehearing en banc. On April 10, 2009, the same panel granted in part Lazarenko's petition for panel rehearing and issued an amended opinion. *United States v. Lazarenko*, 564 F.3d 1026 (9th Cir. 2009) (App. 1-47). The panel also denied Lazarenko's petition for rehearing en banc and stated that no further petitions for rehearing or petitions for

rehearing en banc would be entertained. 564 F.3d at 1029 (App. 1-2).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . . nor be deprived of life, liberty, or property, without due process of law. . . ."

Section 1956 of Title 18 of the United States Code is reproduced at App. 58-73.

STATEMENT OF THE CASE

Petitioner Pavel Lazarenko is the former prime minister of Ukraine. He rose to that position in 1996 after serving in a variety of positions in President Leonid Kuchma's government. In 1997, however, he broke with Kuchma to form an opposition party. He subsequently faced death threats from Kuchma loyalists, as had other opposition politicians and journalists. He fled to the United States in 1999, where immigration officials initially concluded that

he would face a well founded fear of prosecution if returned to Ukraine.

In 2000, Lazarenko was indicted in the Northern District of California. The prosecution alleged that between 1992 and 1999, while he was a government official in Ukraine, Lazarenko had abused his position of power for personal gain. It alleged that he had amassed great personal wealth through various acts of fraud, extortion, and self-dealing. Most significantly, the indictment charged that Lazarenko had conspired with Yulia Tymoshenko, then the head of the United Energy Systems of Ukraine ("UESU"), to siphon nearly two hundred million dollars from UESU. Lazarenko was eventually charged with fifty-three counts of conspiracy, money laundering, wire fraud, and interstate transportation of stolen property. The second superseding indictment ("indictment") is reproduced at App. 74-121.

Most of the charges were eventually dismissed by the district court or the Ninth Circuit. After the government's case-in-chief, the district court granted the defense's Rule 29 motion as to twenty-four of the fifty-three counts. Most significantly, the district court dismissed all counts related to UESU as wholly unproven. The district court dismissed an additional fifteen counts for insufficiency following the jury's guilty verdict.

Lazarenko appealed the remaining fourteen counts to the Ninth Circuit, which had jurisdiction under 28 U.S.C. § 1291. The Ninth Circuit ruled that

the evidence supporting the remaining wire fraud and ITSP counts was insufficient, and it thus reversed the convictions on those six counts. *See* 564 F.3d at 1047. The Ninth Circuit affirmed the convictions on the remaining eight counts of money laundering and conspiracy to commit money laundering. *See* 564 F.3d at 1047.

The sole specified unlawful activity left to support those eight money laundering convictions was extortion, "an offense against a foreign nation" listed in 18 U.S.C. § 1956(c)(7)(B)(ii). The government's theory on the remaining extortion allegations was that while in Ukraine Lazarenko had received bribes from Peter Kiritchenko, Lazarenko's partner in business who had become quite wealthy through his joint ventures with Lazarenko. Those funds later passed through American banks. It is worth noting that the government recently filed a brief in a pending Ninth Circuit appeal of the district court's restitution award to Kiritchenko urging vacation of the award on the grounds that it "seriously affected the fairness, integrity, and public reputation of the proceedings." The government's brief maintains that: "The evidence at trial, and the jury's verdict, amply supports the conclusion that Kiritchenko was not harmed by Lazarenko's money laundering activities."

Since Lazarenko's trial, Yulia Tymoshenko (1) has both been acquitted in Ukraine of any wrongdoing in the UESU affair; (2) led the "Orange Revolution" which put an end to the Kuchma regime;

and (3) is presently the democratically elected prime minister of Ukraine.

Lazarenko now petitions this Court for a Writ of Certiorari from the decision of the Ninth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. Review Is Warranted to Settle Whether the Omission of an Element of an Offense from an Indictment Is Structural Error

Three years ago, this Court granted certiorari in *United States v. Resendiz-Ponce* to determine "whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error." 549 U.S. 102, 103 (2007). Ultimately, however, this Court declined to reach that important constitutional question because it found that the indictment in that particular case had sufficiently alleged the elements of the offense. *Id.* at 107-10. This case presents the opportunity to settle the question that this Court declined to reach in *Resendiz-Ponce*.

A. Foreign Crimes as a Required "Element"

Petitioner Pavel Lazarenko was charged with money laundering and related offenses. The government's theory was that Lazarenko had committed crimes in Ukraine, while he was a government official

there, and then transferred the illegally-obtained funds to the United States. The predicate offenses for the money laundering offenses, in other words, were the alleged crimes committed in Ukraine. The indictment, however, did not allege any violations of Ukrainian criminal law, much less any specific provisions of the Ukrainian Criminal Code ("UCC"). *See* indictment, App. 91-95. In fact, the money laundering counts made no allegations whatsoever that Lazarenko committed conduct that constituted "an offense against a foreign nation." *Id.*

The money laundering statute prohibits certain financial transactions involving proceeds of predicate crimes. It also defines a wide variety of predicate crimes. *See* 18 U.S.C. § 1956(c)(7) (App. 65-70). Certain crimes committed on foreign soil in violation of foreign law – "offense[s] against a foreign nation" – constitute predicate crimes. 18 U.S.C. § 1956(c)(7)(B) (App. 65-66).

When money laundering is charged based on predicate acts occurring in foreign nations, the acts must be crimes in the nations where the acts occur. In other words, it is not enough that such acts would be crimes if committed in the United States – they must be local crimes as well. *United States v. One 1997 E35 Ford Van*, 50 F. Supp. 2d 789, 802 (N.D. Ill. 1999) ("[T]he phrase 'against a foreign nation' . . . requires that the conduct be prohibited under the law of the foreign nation in which it is committed."). Thus, that the predicate act was a local crime is a fact necessary to sustain a conviction. It is therefore an element of

the offense. *See Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

The inclusion of each element of an offense in an indictment ensures that the grand jury was aware of, and found evidence to support, each element necessary to constitute the commission of the alleged offense.

> The inclusion of each of the essential elements in the indictment tends to structure the grand jury's charging decision, focusing its attention on the specific requirements for criminal liability rather than a general sense of the accused wrongdoing. Without a specific reference to an element, the indictment contains no assurance that the grand jury deliberated or even considered whether the facts established that element.

4 Wayne R. LaFave et al., *Criminal Procedure* § 19.2(f) at 895 (4th ed. 2004) (internal quotation marks omitted, alteration removed).

Here, however, the government did not obtain an indictment alleging as an element of any of the charged offenses that Lazarenko's conduct violated Ukranian law. Specifically, as noted above, the indictment did not allege the statutory requirement that extortion was an offense against a foreign nation. The grand jury thus did not consider whether probable cause existed that Lazarenko's conduct violated Ukranian law. That is because the government's pre-trial position was that the illegality of Lazarenko's conduct under Ukranian law was not an

element of any charged offense; at best, the legality of that conduct could be raised as a defense to the charged crimes.

The trial court below correctly ruled, however, that before the petit jury could convict Lazarenko for money laundering, it had to find that Lazarenko's acts were crimes in Ukraine. It thus instructed the jury that it was required to find that the defendant violated either UCC Article 168-2 (bribery by extortion) or 165 (abuse of power). It held that violations of the UCC were elements of the offense, at least for the purposes of the jury instructions submitted to the petit jury.

Still, although the indictment contained no allegations that Lazarenko's acts were local crimes, the trial court rejected Lazarenko's arguments that the charges were deficiently pled. It drew a distinction between the factual findings that must be made by the grand jury and those that must be made by the petit jury. It held that a violation of foreign law was "not an element, for pleading purposes." The Ninth Circuit found no fault with that reasoning. In distinguishing this Court's ruling in *Richardson v. United States*, 526 U.S. 813 (1999), it held that *Richardson* (which discussed which facts constitute "elements" for the CCE statute) "did not comment on the sufficiency of an indictment." 564 F.3d at 1034.

But an element is an element. There is no distinction between an element for the purposes of pleading and an element for the purposes of petit jury

instructions. Every element must be found both by a grand jury and by a petit jury. Every element "must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999). Both the trial court and the Ninth Circuit held that although a violation of foreign law was necessary for the conviction, such a violation did not need to be pled.[1] The lower courts' distinction between pleading elements and conviction elements cannot be sustained.

B. The Remedy for Failure to Plead an Element

Under this Court's precedent, it is clear that every element of a federal criminal offense must be pled in the indictment. It is not clear, however, what remedy must be granted for a violation of that rule. Put differently, it is not clear whether the failure to plead an element constitutes structural error, or whether it is subject to harmless error review.

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[1] The Ninth Circuit suggested that the indictment may have been sufficient because "the government need not allege all the elements of the 'specified unlawful activity,' i.e., the underlying offense." 564 F.3d at 1033. Whether or not that is true, the indictment in a money laundering case certainly must allege all of the statutory elements of the charged money laundering offenses. When the specified unlawful activity alleged is "extortion," as defined in 18 U.S.C. § 1956(c)(7)(B)(ii), those elements include that the offense be "against a foreign nation."

There is currently a division of authority among the circuits on the question. *Compare United States v. Allen*, 406 F.3d 940, 943-45 (8th Cir. 2005) (holding that failure to allege an element may be harmless), *and United States v. Trennell*, 290 F.3d 881, 889-90 (7th Cir. 2002) (same), *with United States v. Spinner*, 180 F.3d 514, 515-16 (3d Cir. 1999) (holding that failure to allege an element is structural error). *See also* 4 Wayne R. LaFave et al., *Criminal Procedure* § 19.3(a) (4th ed. 2004) (discussing the conflict).

The Ninth Circuit had previously held that failure to plead an element is structural error. *United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999). In its brief to the Ninth Circuit, the government suggested that *Du Bo* was no longer good law. While it did not address the issue explicitly, the panel below apparently sided with the government. It held that Lazarenko was not entitled to relief because the indictment had not "misled or prejudiced" him, in part because it had provided sufficient other details regarding the nature of the government's allegations. 564 F.3d at 1034. It also found that Lazarenko was not prejudiced because "the [petit] jury was instructed that it had to find a violation of Ukranian law and was provided with the elements of the relevant Ukranian statutes." *Id.* In short, it held that any error in the failure to allege a foreign offense was harmless in this case.

Whether such an error may be harmless is an exceptionally important question. It is important not

simply to settle the circuit split, but also to clarify the role of the grand jury in our constitutional system.

To be sure, the grand jury is considered an anachronism by some, and it is undoubtedly an inconvenience to federal prosecutors. But to the framers, the grand jury played a crucial role in protecting against government abuses. In late seventeenth century England, grand juries refused to indict subjects for crimes of sedition. *See, e.g.*, *The Trial of the Earl of Shaftesbury*, 8 How. St. Tr. 759, 771-74 (1681), *reprinted in* 5 *The Founders' Constitution*, at 246-47 (P. Kurland & R. Lerner, eds. 1987). In colonial America, grand juries likewise refused to indict citizens like John Peter Zenger who criticized the colonial government. *See* Richard D. Younger, *The People's Panel: The Grand Jury in the United States, 1634-1941*, at 28-52 (1963). *Cf. Stirone v. United States*, 361 U.S. 212 (1960) (recognizing and affirming the historical importance of, and protections inhering in, indictment by grand jury and holding that after an indictment has been returned, its charge may not be broadened through amendment except by grand jury itself).

By contrast, modern critics assert that the grand jury has devolved into a rubber stamp. Andrew D. Leipold, *Why Grand Juries Do Not (And Cannot) Protect the Accused*, 80 Cornell L. Rev. 260, 263-64 (1995). For the sake of expedience if nothing else, the government would perhaps prefer an even weaker grand jury system. It is therefore not surprising that the government has urged for years that deficient

indictments are subject to harmless error review. If the grand jury is relatively unimportant, then it naturally follows that errors in the grand jury process are relatively unimportant as well.

A rule allowing harmless error review, however, could fatally undermine the grand jury system. *See Resendiz-Ponce*, 549 U.S. at 116-17 (Scalia, J., dissenting); *United States v. Omer*, 549 U.S. 1174 (2007) (Scalia, J., concurring in denial of certiorari). Once it is established that a pleading error *may* be held harmless, pleading errors almost always *will* be held harmless. The pernicious argument for routine harmlessness runs like this: so long as an element of the offense is ultimately found by the petit jury, the grand jury's initial failure to find that element must be harmless.

That argument has been repeatedly suggested by the government, both in this case and elsewhere. *Cf. Resendiz-Ponce*, *supra*, United States' Petition for a Writ of Certiorari at 12 ("[A]lthough the grand jury undoubtedly performs a vital protective function, it is the petit jury that provides the ultimate protection for the accused."). That argument was implicitly accepted by the Ninth Circuit panel below, which, in response to Lazarenko's pleading claim, found it "significant" that the previously omitted element had been ultimately found by the petit jury. 564 F.3d at 1034. And that argument, taken to its logical conclusion, would mean that a grand jury's failure to find an element of an offense would almost always be harmless. If that were true, there would be little

point to maintaining the grand jury requirement at all.

The question of harmlessness is thus exceptionally important. This Court should grant certiorari in part to settle a circuit split on a frequently recurring issue. But more importantly, this Court should grant certiorari in order to clarify the constitutional role of the grand jury, and the relationship between the grand jury and the petit jury. As this Court already recognized when it granted certiorari in *Resendiz-Ponce*, it is a question that merits this Court's attention.

II. Review Is Warranted to Decide if a Foreign Head of State Can Be Convicted of Money Laundering Based on Conduct on Foreign Soil That Neither He, Nor Any Reasonable Person, Could Have Known Then Came Within the Scope of the Money Laundering Statutes

The second question posed by this petition is of paramount legal and diplomatic importance: how could Mr. Lazarenko have committed a money laundering offense between 1994 and 1999 involving the alleged proceeds of foreign bribery when, according to the Department of Justice and congressional leaders, such conduct remained outside the reach of the money laundering statutes until the passage of the Patriot Act in 2001?

The government alleged that while he was a government official in Ukraine, Lazarenko took bribes from a businessman named Peter Kiritchenko. At trial, the government presented evidence that Kiritchenko split the profits from business ventures with Lazarenko. Although the evidence demonstrated that the ventures made Kiritchenko a multi-millionaire and that he was a close personal friend of Lazarenko, Kiritchenko also testified that he feared that if he failed to give Lazarenko money, his business would suffer. Put differently, the government alleged that Lazarenko threatened Kiritchenko with economic harm if he failed to make payments.

The government made no allegation that Lazarenko made any threats of violence against Kiritchenko. Indeed, the government has now taken the position in the Ninth Circuit that Kiritchenko should be stripped of the restitution awarded him by the district court because "Kiritchenko conspired with Lazarenko to launder funds throughout the entire time he made extortion payments" and because the restitution "statutes were never intended to authorize courts to award restitution to the perpetrators of an offense."

Foreign acts of bribery are now listed as a specified unlawful activity in the money laundering statute. 18 U.S.C. § 1956(c)(7)(B)(iv). But at the time of Lazarenko's conduct, bribery was not listed. The bribery provision was added as part of the Patriot Act in 2001. *See* Pub. Law 107-56 § 315, 115 Stat. 272, 309 (Oct. 26, 2001). Thus, since bribery was not

explicitly listed at the time of the alleged offenses between 1994 and 1998, the government in this case relied on the extortion provision, added to the list of foreign offense predicates in 1992. 18 U.S.C. § 1956(c)(7)(B)(ii).

The government argued that the extortion provision of the statute already covered acts of bribery and official corruption prior to 2001. The Ninth Circuit agreed. It relied on this Court's opinion in *Evans v. United States*, 504 U.S. 255 (1992), which held that "extortion" in the Hobbs Act covers acts of bribery. Purportedly following *Evans*, the panel below concluded: "The term 'extortion' has an ordinary meaning and it is not ambiguous." 564 F.3d at 1039.

That conclusion was grossly oversimplified and betrayed a remarkable misunderstanding of both the crime of extortion and the general rules of statutory interpretation.

The term "extortion" has many different meanings, and in various statutes and various times, it has covered different types of conduct. The statutory definitions of "extortion" in American law "vary greatly." Wayne R. LaFave, *Criminal Law* § 20.4 at 1014 (4th ed. 2003). Most significantly, some definitions cover extortion by threats of economic harm, while many others cover only extortion by threats of violence. *See id.*

It may or may not be true as a historical matter, as this Court held in *Evans*, that at common law, extortion "by the public official was the rough

equivalent of what we would now describe as 'taking a bribe.'" 504 U.S. at 260. As Justice Thomas noted in his dissent, "[m]ost commentators maintain that extortion and bribery were distinct crimes at early English common law." *Id.* at 280 n.2 (Thomas, J., dissenting). Regardless, even if the *Evans* majority was correct about the eighteenth century meaning of "extortion," the fact remains that by the twentieth century, the meaning of "extortion" had changed. *See* LaFave, *supra*, § 20.4. It is unclear why the Ninth Circuit was so confident that when Congress added "extortion" to the money laundering statute in 1992, it sought to use the ancient meaning rather than the modern meaning.

It is true that statutory terms are "generally presumed" to have their common law meaning. *Evans*, 504 U.S. at 259 (quoting *Taylor v. United States*, 495 U.S. 575, 592 (1990)). But that general presumption is not an immutable rule. If there is some indication that Congress used a term to mean something different than what the term meant 200 years ago, the general presumption should give way. And in this instance, every indication is that Congress intended "extortion" in the money laundering statute to mean extortion by threats of violence.

In the statute, extortion is included with other acts of violence. *See* 18 U.S.C. § 1956(c)(7)(B)(ii). When the extortion provision was passed in 1992, it was grouped with kidnaping and robbery. As Senator

D'Amato explained, the purpose of the 1992 amendment was to reach "terrorists and other violent offenders."

Prior to 2001, it was the common understanding of the statute that it covered only violent acts of extortion. In fact, the very reason that bribery was added to the statute in 2001 was to cover non-violent acts of corruption – acts that were not previously covered. In 2000, when the Departments of Justice and Treasury first asked Congress to add bribery, it explained that bribery and acts of official corruption were "not currently covered by the money laundering statute." Lawrence H. Summers & Janet Reno, *The National Money Laundering Strategy For 2000*, at 19, 73 (March 2000).

The legislative history of Section 315 of the Patriot Act, moreover, makes abundantly clear that Congress believed that it was amending the money laundering statute to reach – for the first time – acts of bribery and public corruption. *See, e.g.*, H.R. Rep. No. 107-250 at 55 (2000); 106 Cong. Rec. No. 106-38, at 363-64. *See also Washington v. Guillen*, 537 U.S. 129, 145 (2003) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

Furthermore, the Department of Justice's "Field Guidance on New Authorities (Redacted) Enacted in the 2001 Anti-Terrorist Legislation" made clear that the term "extortion" in § 1956(c)(7)(B)(ii) had referred only to a crime of violence, and that it was with the

addition of (c)(7)(B)(iv) that § 1956 finally reached foreign bribery and corruption:

> Until now, the only foreign crimes listed as predicates for money laundering under 18 U.S.C. §§ 1956 and 1957 were drug trafficking, bank fraud, *and certain crimes of violence including* murder, kidnaping, robbery, *extortion* and use of explosives. See 18 U.S.C. §§ 1956(c)(7)(B). *This list is expanded to some extent by Section 315 of the Anti-Terrorism Act to include* 1) any crime of violence, *2) bribery of a public official, or misappropriation of public funds;* 3) smuggling munitions or technology with military applications; and 4) any "offense with respect to which the United States would be obligated by multilateral treaty" to extradite or prosecute the offender.

Id. at 12 (emphasis added).

None of this legislative history was ever disputed by either the government or by the Ninth Circuit below. The Ninth Circuit simply ignored all of it. It held that extortion means bribery, period, so no further analysis is needed.

The implications of that holding are remarkable. The Ninth Circuit implicitly held that the Departments of Justice and Treasury, as well as Congress itself, were *mistaken* in their belief that extortion did not cover bribery. It also therefore implicitly held that if a foreign official like Lazarenko were similarly

mistaken about the meaning of extortion, his mistake could lead to criminal liability and imprisonment.

That ruling cannot be squared with the fair warning requirement. Where criminal statutes are reasonably susceptible of two interpretations, the narrower interpretation must be chosen. *United States v. Lanier*, 520 U.S. 259, 265 (1997). At a minimum, the legislative history regarding the money laundering statute and the Patriot Act's amendments thereto demonstrates that the statute was susceptible to two interpretations. Even if it is true that the Departments of Justice and Treasury were *mistaken* about the meaning of the statute prior to 2001, they were not *unreasonably mistaken*. No American citizen, much less a foreign head of state, should go to prison for making the same reasonable mistake. Under the rule of lenity, because the term "extortion" was ambiguous in the money laundering statute, the narrower definition must be chosen.

Mr. Lazarenko, the prime minister of Ukraine in the mid-1990s, was the leader of the Ukranian parliamentary opposition at the time of his 2000 indictment. A perception that his trial and conviction here were fundamentally unfair could profoundly prejudice this country's relations with other nations. Of equal importance, globalization requires that private and public funds of the United States pass through banking systems around the world, thereby subjecting public officials and private citizens of this country to the jurisdiction of foreign judicial systems. We cannot expect to be afforded any greater degree of

due process in the courts of other countries than that which we provide to foreign officials and citizens in our own judicial system. Certiorari should be granted to decide the "fair warning" issue.

CONCLUSION

For the reasons stated, certiorari should be granted on either or both of the important questions discussed above.

Dated: July 9, 2009

Respectfully Submitted,

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564 F.3d 1026

United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Pavel Ivanovich LAZARENKO, Pavlo Ivanovych Lazarenko, Defendant-Appellant.
No. 06-10592.

Argued and Submitted June 9, 2008.
Filed April 10, 2009.

Dennis P. Riordan (argued), Donald M. Horgan, Riordan & Horgan, San Francisco, CA; Doron Weinberg, Weinberg & Wilder, San Francisco, CA, for the defendant-appellant.

Hartley M.K. West (argued), Assistant United States Attorney; Scott N. Schools, United States Attorney; Barbara J. Valliere, Chief, Appellate Section, San Francisco, CA, for the plaintiff-appellee.

Appeal from the United States District Court for the Northern District of California, Martin J. Jenkins, District Judge, Presiding. D.C. No. CR-0-00284-MJJ.

Before A. WALLACE TASHIMA, M. MARGARET McKEOWN, and RONALD M. GOULD, Circuit Judges.

ORDER

The petition for panel rehearing is granted in part. The opinion filed September 26, 2008, and

appearing at 546 F.3d 593, is withdrawn and it may not be cited as precedent by or to this court or any district court of the Ninth Circuit. A new opinion is filed contemporaneously.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35. The petition for rehearing en banc is denied. No further petitions for rehearing or petitions for rehearing en banc will be entertained.

OPINION

McKEOWN, Circuit Judge:

During his meteoric rise from serving as a local Ukrainian official to Prime Minister of Ukraine, Pavel Ivanovich Lazarenko formed multiple business relationships and engaged in a tangled series of business transactions that netted him millions of dollars. Lazarenko kept his money in foreign bank accounts, transferring funds from one account to another across the globe in an effort, so he was accused, to disguise and conceal the sources and ownership of the proceeds from the Ukrainian people. After the money passed through bank accounts in the United States, from Swiss, off-shore, and other accounts, the United States charged him in a 53-count indictment with conspiracy, money laundering, wire fraud, and interstate transportation of stolen property. Lazarenko was convicted on fourteen counts and now challenges

those convictions on appeal. We affirm eight of his convictions, but reverse six others.

I. BACKGROUND

During the 1990s, Lazarenko was a public official in Ukraine. For several years he served in regional governmental positions, including as Governor of the Dnepropetrovsk region of Ukraine. He rose to the level of Ukrainian First Vice Prime Minister in 1995 and in May 1996, Lazarenko was appointed Prime Minister. Following a rift in his relationship with President Leonid Kuchma, he was dismissed from this position in July 1997. He then became a member of the Ukrainian Parliament and led the opposition Hromada Party.

While serving as a government official, Lazarenko became involved in the affairs of a number of businesses and formed relationships with prominent businessmen. The United States alleged that certain of Lazarenko's business relationships amounted to extortion and that he defrauded the Ukranian [sic] people by obtaining interests in companies, allocating privileges to cronies, and then failing to disclose his assets and wealth as required on Ukranian [sic] financial disclosure forms. The government identified five arrangements that formed the basis for the charges in the indictment.

A. THE UNDERLYING SCHEMES

1. *Extortion of Kiritchenko*

According to testimony at trial, Lazarenko was extremely powerful as the governor of the Dnepropetrovsk region of Ukraine and in his other public roles. He required businesses to pay him fifty percent of their profits in exchange for his influence to make the businesses successful. Conversely, Lazarenko used his influence to disadvantage the businesses if he was not paid.

In 1990, Peter Kiritchenko, a businessman, formed a company known as Agrosnabsbyt, which was involved in agriculture and metals. In 1992, Kiritchenko met with Lazarenko because, according to Kiritchenko, "to do any kind of serious trade one needed [Lazarenko's] agreement." Lazarenko informed Kiritchenko that he worked with everyone "50-50," which Kiritchenko interpreted as meaning that Lazarenko would control fifty percent of the business and take fifty per-cent of the profits. Kiritchenko initially transferred $40,000 to Lazarenko as a gesture of "good faith." In January 1993, Kiritchenko transferred a fifty percent interest in Agrosnabsbyt to Ekaterina Karova, a relative of Lazarenko, and transferred fifty percent of the profits from the business to accounts controlled by Lazarenko. Later, Lazarenko and Kiritchenko partnered to move Lazarenko's money between accounts and together they purchased the European Federal Credit Bank ("EuroFed").

2. *Extortion of Dityatkovsky*

According to the indictment, Lazarenko established a similar relationship with Alexei Alexandrovich Dityatkovsky. In 1993, Lazarenko met Dityatkovsky and took a fifty percent interest in his company, Dneproneft, along with fifty percent of the profits as well. Lazarenko's share went to his driver and to an associate.

3. *Naukovy State Farm*

While Lazarenko was governor of Dnepropetrovsk, he was also actively involved in the operations of Naukovy State Farm ("Naukovy"), a dairy operation that was directed by Mykola Agafonov.[1] Naukovy also had secured the right to export metal products and raw materials. Naukovy purchased cattle and farm equipment from a Dutch company, Van der Ploeg von Terpstra ("Van der Ploeg"). Van der Ploeg kept a foreign currency account at ABN Amro Bank for its business with Naukovy (the "ABN Amro account"). Unbeknownst to Van der Ploeg's chief accountant, Agafonov was given access to this account for his own use. Agafonov used the money in the ABN Amro account to, among other things, purchase a BMW and pay his credit card bills.

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[1] "Naukovy" is the spelling of the name of the company in Ukrainian. Occasionally the parties or the record refer to it by its Russian name "Naucnij."

Lazarenko was also actively involved in the operations at Nikopolsky Metal Works factory ("Nikopolsky"). At his direction, $2.4 million was transferred from Nikopolsky to Van der Ploeg's ABN Amro account supposedly to purchase wheat on behalf of Naukovy to combat a food crisis that was plaguing Ukraine at the time.[2] The accountant for Naukovy and the bookkeeper for Van der Ploeg both testified that they did not know whether wheat was ever purchased. The records reflect that $1.2 million was transferred from the ABN Amro account to Agafonov's account in Hungary at PostaBank (the "PostaBank account"). In turn, $1.205 million was transferred from the PostaBank account to an account known as LIP Handel, controlled by Lazarenko in Switzerland. Lazarenko then transferred the money from this Swiss account to various banks, including a $1.8 million transfer to an account controlled by Kiritchenko at Bank of America in San Francisco, California.

4. *United Energy Systems of Ukraine*

Eventually, Lazarenko became the First Prime Minister of Ukraine and was responsible for the energy section within the government. According to the indictment, an associate of Lazarenko's, Yulia

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[2] Nikopolsky Metal Works factory is sometimes referred to in the record and by the parties as "Nikopol" or as "Nikopol Ferroalloy."

Tymoshenko, created a natural gas company, United Energy Systems of Ukraine ("UESU"), which received deliveries of gas from RAO Gazprom. UESU was held in large part by United Energy International, Ltd. ("UEIL"), which was owned by a Turkish national. UESU conveyed title to the gas to UEIL such that payments from Ukrainian customers for gas were diverted to UEIL. UEIL did not pay RAO Gazprom for the gas deliveries with the money it received from customers. Instead, it transferred approximately $140 million to a Cypriot company, Somolli, that was controlled, in part, by Tymoshenko. UEIL and Somolli transferred $97 million to accounts controlled by Kiritchenko in Switzerland, Poland, and the United States. Kiritchenko then transferred $120 million to accounts controlled by Lazarenko in Switzerland and Antigua. Lazarenko made two transfers of $14 million each from one of these accounts to accounts in the United States.

5. *PMH/GHP*

Lazarenko and Kiritchenko also allegedly controlled a Panamanian company, GHP Corp. ("GHP"). According to the U.S. government, in 1997, Lazarenko, by then Prime Minister, caused the Ukrainian Cabinet of Ministers to contract with GHP for the purchase of six pre-fabricated homes. GHP turned to Pacific Modern Homes ("PMH") in California and purchased six pre-fabricated homes for $524,763. The Cabinet of Ministers purchased the homes from GHP for $1,416,000. GHP produced false invoices to

customs officials to make it appear that it had shipped the homes and paid $1,416,000 for them. Half of the profit realized by GHP was deposited into an account controlled by Lazarenko.

B. THE CHARGES

Based on Lazarenko's business activities, the government brought numerous charges. Count 1 charged Lazarenko with conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h), for conducting financial transactions that involved the proceeds of extortion, wire fraud, and receipt and transfer of property that was stolen.

Counts 2 through 5 charged Lazarenko with money laundering, in violation of 18 U.S.C. § 1956(a)(2). The indictment specifically identified four wire transfers from Kiritchenko's ABS Trading account in San Francisco to Lazarenko's account in Geneva, Switzerland in 1994 and early 1995. Counts 6 through 8 charged Lazarenko with money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B). These transactions allegedly occurred in November 1997, August 1998, and September 1998. All the money laundering counts were based on the specific unlawful activities of receipt and transfer of property that was "stolen, unlawfully converted, and taken by fraud," in violation of 18 U.S.C. §§ 2314 and 2315; "extortion as specified in 18 U.S.C. § 1956(c)(7)(B)(ii); and wire fraud in violation of 18 U.S.C. §§ 1343 and 1346." *Id.*

Counts 9 through 30 charged Lazarenko with wire fraud in violation of 18 U.S.C. §§ 1343 and 1346. Specifically, Lazarenko was charged with honest services fraud against the people of Ukraine for obtaining ownership interests in Agrosnabsbyt, Dneproneft, and GHP, using his authority and influence to grant these companies privileges, and receiving money from these businesses. The indictment identified specific wire transfers in 1997 and 1998.

Counts 31 through 53 charged Lazarenko with transportation of stolen property in violation of 18 U.S.C. § 2314. The indictment identified a wire transfer in 1994 and several others in 1997 and 1998.

C. DISMISSAL OF SOME CHARGES

At the close of the government's case-in-chief, the district court granted in part Lazarenko's Rule 29 motion for a judgment of acquittal. The scope of the indictment was massive and the trial testimony voluminous. The district court carefully reviewed the evidence in addressing the Rule 29 motion. Significantly, the district court dismissed the allegations that related to Lazarenko's relationship with UESU. The district court ruled that the government failed to prove that there was fraud in Lazarenko's alleged dealings with UESU, that Lazarenko's failure to inform the Ukrainian people that he was receiving money from UESU was a material omission in support of the government's property fraud theory, or that there was material harm to support the theory

that the UESU dealings constituted honest services fraud. The court also held that the money laundering charges could not rest on the property fraud theory with respect to UESU.

The court further concluded that the evidence did not support charges arising out of the PMH-GHP fraud because the government failed to establish the element of material harm. On the government's motion, the court dismissed the allegations regarding Dityatkovsky. Altogether, the court dismissed 24 counts: counts 9 through 19 (wire fraud), count 30 (wire fraud), counts 32 through 42 (interstate transportation of stolen property), and count 53 (interstate transportation of stolen property).

Following the jury's verdict of guilty on all of the remaining counts, the district court partially granted Lazarenko's renewed Rule 29 motion and dismissed counts 20 through 24 and counts 43 through 52. The court concluded that "[n]o reasonable jury could find that the transfers [in counts 20-23 (wire fraud) and counts 43-46 (interstate transportation of stolen property)] represented the proceeds of Kiritchenko extortion or Naukovy fraud." The court further concluded that counts 24 and 47, for wire fraud and interstate transportation of stolen property, respectively, failed because the government's theory that the funds involved in that alleged transfer had been extorted from Kiritchenko was not supported by the indictment. Finally, the court dismissed counts 48 through 52, which charged Lazarenko with interstate transportation of stolen property, because the court

found that there were sufficient clean funds in the accounts at issue to cover the transfers.

Lazarenko now challenges his remaining convictions on counts 1 through 8, 25 through 29, and 31.

II. ANALYSIS

A. SUFFICIENCY OF THE INDICTMENT

Lazarenko argues that the indictment must be dismissed because it failed to allege that his conduct violated Ukrainian law. We review the sufficiency of an indictment de novo. *United States v. Berger,* 473 F.3d 1080, 1097 (9th Cir.2007). An indictment is sufficient if it (1) "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend" and (2) "enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States,* 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). "[A]n indictment 'should be read in its entirety, construed according to common sense, and interpreted to include facts which are necessarily implied.'" *Berger,* 473 F.3d at 1103 (quoting *United States v. King,* 200 F.3d 1207, 1217 (9th Cir.1999)). "Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction." Fed.R.Crim.P. 7(c)(3).

The indictment tracks the statutory language in charging money laundering, wire fraud and interstate transportation of stolen property. We have previously held that those statutes set forth the essential elements of these offenses. *See United States v. Savage,* 67 F.3d 1435, 1441 (9th Cir.1995) (money laundering); *United States v. Ladum,* 141 F.3d 1328, 1341 (9th Cir.1998) (money laundering); *United States v. Bonallo,* 858 F.2d 1427, 1433 (9th Cir.1988) (wire fraud); *United States v. Rosi,* 27 F.3d 409, 414-15 (9th Cir.1994) (interstate transportation of stolen property). Lazarenko seeks to import an additional element into these offenses, claiming that the Ukrainian law at issue is also an essential element because the government must prove a violation of Ukrainian law to sustain a conviction.

Nothing in our case law supports requiring the government to plead a specific violation of foreign law in an indictment. Indeed, Lazarenko's challenge does not achieve novelty status simply because it involves foreign law. To analyze his claim, we look for guidance to our general precedent on indictments. For example, when bringing charges of money laundering, the government need not allege all the elements of the "specified unlawful activity," i.e., the underlying offense. *See United States v. Lomow,* 266 F.3d 1013, 1017 (9th Cir.2001); *United States v. Golb,* 69 F.3d 1417, 1429 (9th Cir.1995). Here, the violation of Ukrainian law is the specified unlawful activity.

Nor can it be said that the omission of a citation to foreign law in the charges of wire fraud and

interstate transportation of stolen property misled or prejudiced Lazarenko. *See* Fed.R.Crim.P. 7(c)(3). The indictment provided detailed allegations regarding the basis for the charges, including dates, amounts, account numbers, and sources of the money. *Cf. Berger,* 473 F.3d at 1101. Significantly, the jury was instructed that it had to find a violation of Ukranian [sic] law and was provided with the elements of the relevant Ukranian [sic] statutes.

Relying on *Richardson v. United States,* 526 U.S. 813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999), Lazarenko contends that there is a long list of predicate offenses to the money laundering statute and without a finding regarding the specific predicate offense, there is a risk of disagreement among the jurors as to what the defendant did. This argument falters, though, because not only did the Supreme Court not comment on the sufficiency of an indictment in *Richardson,* here the indictment identified interstate transportation of stolen property, extortion, and wire fraud as the "specified unlawful activit[ies]" and provided detailed allegations regarding each of these offenses. There was little room for jurors to disagree on the underlying offenses. The indictment against Lazarenko was legally sufficient.

B. WIRE FRAUD CHARGES – COUNTS 25 THROUGH 29

Lazarenko claims that the government constructively amended the indictment following the court's

dismissal of the UESU allegations by changing its theory to argue that the wire transfers charged as wire fraud in counts 25 and 26 of the indictment were in furtherance of the Naukovy fraud. He also challenges the sufficiency of the evidence on counts 25 through 29.

We review de novo whether there has been a constructive amendment to an indictment. *United States v. Pang,* 362 F.3d 1187, 1193 (9th Cir.2004). "A constructive amendment occurs when the defendant is charged with one crime but, in effect, is tried for another crime." *Pang,* 362 F.3d at 1193.

The indictment charged generally that the accounts involved in the transfers alleged as wire fraud in counts 25 to 26 received proceeds from both fraud and extortion. However, under the heading "The UESU Fraud," the government alleged more specifically that

> Between February of 1996 and September of 1997, the money from Somolli, along with other funds, totaling more than $120,000,000 was transferred from Kiritchenko's accounts into accounts controlled by Lazarenko in Switzerland and Antigua. Thereafter, Lazarenko transferred portions of these funds from Switzerland into bank accounts in the Northern District of California, including two transfers of $14,000,000 each on August 1, 1997.

Count 25 and count 26 both allege a transfer of $14 million into a bank account in the Northern District

of California on August 1, 1997. The plainest reading of these allegations is that the transfers in counts 25 and 26 are the same two transfers alleged under the heading "The UESU Fraud." When the district court dismissed the UESU allegations after the close of the government's case-in-chief, counts 25 and 26 should have been dismissed as well.

The government asserted in its brief that the $14 million transfers were not necessarily funds derived from the UESU scheme because the indictment alleged that money from Somolli, "*along with other funds,*" was deposited into Lazarenko's Swiss bank account. We decline to read this catch-all phrase as turning the two $14 million transfers into proceeds from the Naukovy fraud. The paragraph in which these allegations are found begins, "Lazarenko . . . received and transferred money that had been stolen, converted and taken by fraud in connection with the distribution of natural gas in Ukraine as follows." Each allegation following relates directly to the UESU scheme, including allegations about the parties involved and payments between UEIL, Somolli, and UESU. It simply makes no sense to read this paragraph as concluding with Lazarenko transferring money from a completely different scheme. The details of the transfers in this paragraph and in counts 25 and 26 are identical and the only logical conclusion that can be drawn is that those counts are premised on the UESU scheme.

At oral argument, the government claimed that an allegation in a later paragraph, paragraph 35,

supported its argument that the transfers of $14 million in counts 25 and 26 were part of the Naukovy fraud. This paragraph, though, does not advance the government's position. The portion of the paragraph to which the government points merely alleges that "[b]etween 1993 and 1994, Lazarenko received at least $14,000,000 from Naukovy State Farm." This allegation neither speaks to whether *two* transfers of $14 million were made in August 1997, nor does anything there cause us to read the allegations under "The UESU Fraud" any differently.

Even with the government's shift in theory, the government failed to provide sufficient evidence to support Lazarenko's wire fraud convictions on counts 25 and 26, as well as on counts 27, 28, and 29. We evaluate a challenge to the sufficiency of the evidence by viewing the evidence in the light most favorable to the prosecution. *Jackson v. Virginia,* 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Evidence is sufficient to support a conviction if, viewed in this light, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

We first address a threshold question, namely whether the government must trace the wire transfer proceeds back to some unlawful activity. Lazarenko puts it this way: whether "a wire transfer not proven to contain proceeds of theft or fraud for the purpose of a transporting stolen property offense [can] be found, on the same evidence, to contain such illegal proceeds." This argument piggy-backs on the government's

burden in the context of interstate transportation of stolen property.

To sustain a conviction for interstate transportation of stolen property, the government must prove that the money transported was stolen, converted, taken by fraud, or derived from such property. *See United States v. Morgan,* 805 F.2d 1372, 1377-78 (9th Cir.1986). The property must be "directly traceable" to the fraud or theft. *Id.* at 1378. By contrast, in a money laundering charge, the commingling of tainted money with clean money taints the entire account. *See United States v. English,* 92 F.3d 909, 916 (9th Cir.1996). The money transferred from a commingled account does not need to be traceable to fraud, theft, or any wrongdoing at all. It is enough that the money, even if innocently obtained, was commingled in an account with money that was obtained illegally. *See id.*

Wire fraud does not necessarily rest on the characterization of the funds. It is well-established that the wire used in the wire fraud scheme need only have been "in furtherance" of the scheme. *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.,* 806 F.2d 1393, 1399-1400 (9th Cir.1986); *see, e.g., United States v. Johnson,* 297 F.3d 845, 871 (9th Cir.2002) (upholding a wire fraud conviction where the wire involved was a telephone call). In a case such as this, where the wire at issue is a wire transfer of funds that are connected to an unlawful activity, the "in furtherance" inquiry may be met without a strict tracing of the wired funds. We decline to narrow the

"in furtherance" focus by requiring the funds to be traced back to a particular unlawful activity.[3]

We turn, then, to the question whether the wire transfers alleged in counts 25 to 29 were "in furtherance" of the Naukovy fraud. To support a wire fraud charge, the wire must be "incident to the execution of the scheme" and not "part of an after-the-fact transaction that, although foreseeable, was not in furtherance of the defendant's fraudulent scheme." *United States v. Lo,* 231 F.3d 471, 478 (9th Cir.2000) (explaining the principle in the context of mail fraud);[4] *United States v. Manarite,* 44 F.3d 1407, 1413 (9th Cir.1995) (finding that mailings and phone calls made after a "one-shot" credit scam was completed were not in furtherance of an ongoing scheme). The importance of the temporal aspect of the wire transfer to the underlying scheme is best illustrated in our case law: "[T]he pertinent question is not whether or not the defendant 'had obtained all the money[she] expected to get' before the [wire] occurred. Rather, . . . the

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[3] Thus, we are not persuaded by Lazarenko's argument that there was instructional error with respect to the wire fraud counts. The district court correctly instructed the jury that it needed to determine whether the wire was "an important part of the scheme," defining "important" as "incident to an essential part of the scheme." The court was not required to instruct the jury on how to determine whether the accounts contained the proceeds from a fraud.

[4] "It is well settled that cases construing the mail fraud and wire fraud statutes are applicable to either." *United States v. Shipsey,* 363 F.3d 962, 971 n. 10 (9th Cir.2004).

[wire] can occur after the defendant has obtained her fee, if 'the [wire] is part of the execution of the scheme as conceived by the perpetrator at the time.'" *Lo,* 231 F.3d at 478 (quoting *United States v. Sampson,* 371 U.S. 75, 79, 83 S.Ct. 173, 9 L.Ed.2d 136 (1962); *Schmuck v. United States,* 489 U.S. 705, 715, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989)).

The wire transfers at issue occurred in 1997 and 1998, approximately three or four years after the money was wired into the account. Counts 25 and 26 are transfers of $14 million from Lazarenko's CARPO-53 account in Switzerland to Kiritchenko's EuroFed accounts at Pacific Bank in California and at Commercial Bank of San Francisco. Count 27 is a transfer of $24 million from Lazarenko's EuroFed account in Switzerland to a EuroFed account at Hambrecht & Quist in California. Counts 28 and 29 are transfers of $9 million and $5.3 million from Lazarenko's Lady Lake account in the Bahamas to Kiritchenko's account at Commercial Bank of San Francisco and to an account controlled by Lazarenko at WestAmerica Bank in California.

The government's theory was that these transfers were meant to hide Lazarenko's fraudulent activity as he sought political office. Kiritchenko testified at trial that Lazarenko closed his CARPO-53 bank account in Switzerland in 1997, after Lazarenko was dismissed as Prime Minister. This account contained close to $200 million. He explained that Lazarenko made the transfers that are alleged in counts 25 to 29 of the

indictment because he was under investigation in Ukraine and did not want his assets frozen.

Under the facts of this case, we conclude no rational trier of fact could find that these transfers in 1997 and 1998 were "in furtherance" of the Naukovy fraud, which centered on allegedly shady agricultural and personal purchases. The fraudulent activity was completed, and the money concealed, in 1994, when the money reached Lazarenko's control and he deposited it into coded bank accounts where it remained for three years. Subsequent transfers were not part of the scheme as it was originally conceived. *Cf. Lo,* 231 F.3d at 478. Nothing in the evidence supports an inference, let alone a conviction, on the grounds that the transfers were simply a delayed link in the fraudulent chain.

If the government's theory were correct, then it would be possible for an ordinary fraud to be converted into wire fraud simply by the perpetrator picking up the telephone three years later and asking a friend if he can store some fraudulently-obtained property in his garage before the police execute a search warrant or later taking the proceeds of fraud and transferring them to another bank. The government's theory extends an already broad statute too far. Concealing the source and ownership of fraudulently-obtained property in downstream transactions is better understood as money laundering absent evidence that the wire transfer is "incident to an essential part of the scheme." *Lo,* 231 F.3d at 478

(quoting *Pereira v. United States*, 347 U.S. 1, 8, 74 S.Ct. 358, 98 L.Ed. 435 (1954)) (emphasis omitted).

We reverse Lazarenko's convictions on counts 25 through 29.

C. MONEY LAUNDERING - COUNTS 6 THROUGH 8

Our reversal of Lazarenko's convictions on counts 25 to 29 does not, as Lazarenko urges, require us to reverse his convictions on counts 6, 7, and 8 for money laundering. Count 6 alleged that in November 1997 Lazarenko laundered $6 million from a EuroFed account at Commercial Bank in San Francisco to another EuroFed account. Just three months earlier, in August 1997, the Commercial Bank account had received the $14 million transfer that was charged as wire fraud in count 26. Count 7 alleged that Lazarenko laundered $6.745 million by drawing a check on the account of one of his companies, Dugsbery, Inc., and using it to purchase a home in Marin County, California, in 1998. Count 8 charges Lazarenko with an unlawful transfer of $2.3 million from one Dugsbery account at WestAmerica Bank to another at Bank Boston Robertson Stevens, also in 1998. The money in the Dugsbery account can be traced to Lazarenko's Lady Lake bank account in the Bahamas; the transfer of money from Lady Lake to the Dugsbery account was charged as wire fraud in count 29.

The funds in the San Francisco EuroFed account and in the Dugsbery WestAmerica account can be traced back to Lazarenko's large CARPO-53 account, where he deposited proceeds from his Naukovy fraud and from his extortion of Kiritchenko. The government contends that even if Lazarenko's wire fraud convictions are reversed, the money laundering charges in counts 6, 7, and 8 still rest on Lazarenko's laundering of funds extorted from Kiritchenko.

The government was somewhat inconsistent in how it portrayed these counts to the jury. During its closing argument, when summing up counts 6, 7, and 8, the government at times referred only to the fraud allegations, making no mention of extortion proceeds. Nonetheless, argument is not evidence, and the evidence shows that proceeds from extortion ended up in the EuroFed accounts and in the Dugsbery account. At trial, the government showed that Lazarenko laundered proceeds from the extortion. Recognizing that we consider these facts in the light most favorable to the government, *Jackson*, 443 U.S. at 324, 99 S.Ct. 2781, we affirm the convictions on counts 6, 7, and 8.

D. MONEY LAUNDERING – COUNTS 2 THROUGH 5

We affirm Lazarenko's money laundering convictions on counts 2 through 5. The statute clearly lists "extortion" as a foreign offense that may be a predicate offense for money laundering. 18 U.S.C.

§ 1956(c)(7)(B)(ii). Lazarenko asserts that "extortion" as it was used in the money laundering statute, 18 U.S.C. § 1956, at the time of his conduct, is limited to extortion through violence and the extortion he is charged with is more akin to bribery. We review de novo "[t]he district court's interpretation of the money laundering statute . . . and the scope of the conduct covered by the statute." *United States v. Deeb,* 175 F.3d 1163, 1166-67 (9th Cir.1999).

Generally speaking, § 1956 criminalizes the laundering of the proceeds of a "specified unlawful activity." 18 U.S.C. § 1956. During the period alleged in the indictment against Lazarenko, 1992-1998, "specified unlawful activity" was defined to include:

> (A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;
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> (B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving
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> (i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act)
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> . . . .

> (ii) kidnapping, robbery, or extortion; or[5]
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> (iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978).

18 U.S.C. § 1956(c)(7) (1992). In 2001, Congress amended this section to include "bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official" as a "specified unlawful activity." 18 U.S.C. § 1956(c)(7)(B)(iv).

Extortion, as it is criminalized under the Hobbs Act, 18 U.S.C. § 1951, can be committed through the threat of violence or under color of official right. *See Evans v. United States,* 504 U.S. 255, 261-62, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992). Lazarenko urges that "extortion" as it is used in § 1956 does not include nonviolent foreign extortion. He claims that such conduct is equivalent to foreign bribery and public corruption and that these offenses were beyond the reach of federal law until the Patriot Act of 2001.[6]

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[5] In 1996, Congress amended this clause to add "or destruction of property by means of explosive or fire." *See* 18 U.S.C. § 1956(c)(7)(B)(ii).

[6] The Foreign Corrupt Practices Act punished those who offered bribes to foreign officials, but did not reach the foreign officials who received the bribes. 15 U.S.C. §§ 78dd-1, 78dd-2; *United States v. Castle,* 925 F.2d 831, 833-34 (5th Cir.1991).

"It is a familiar 'maxim that a statutory term is generally presumed to have its common law meaning.'" *Evans,* 504 U.S. at 259, 112 S.Ct. 1881 (quoting *Taylor v. United States,* 495 U.S. 575, 592, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990)). At common law, extortion was a crime that resembled what we know as bribery, and involved an abuse of power by a public official. *Id.* at 260, 112 S.Ct. 1881. Federal statutes have expanded that definition to include the obtaining of property by force. *Id.* at 261, 112 S.Ct. 1881.

We presume that Congress was aware of the common law meaning of extortion when it enacted § 1956. As the Supreme Court has explained,

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Evans, 504 U.S. at 259-60, 112 S.Ct. 1881 (quoting *Morissette v. United States,* 342 U.S. 246, 263, 72 S.Ct. 240, 96 L.Ed. 288 (1952)). Significantly, Congress did not qualify the term in any way that suggests that we should read "extortion" as excluding the

common law definition. The fact that "extortion" is listed with "kidnapping" and "robbery" does not compel us to give the term a narrower meaning or one predicated on force or violence.

The 2001 amendment to § 1956 does not become superfluous if we read "extortion" to include extortion under color of official right. Bribery and extortion under color of official right are not co-extensive. "Bribery of a public official" extends to the individual who offers the bribe as well as to the public official who accepts the bribe.[7] "Misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official" will also capture conduct not punishable as "extortion under color of official right" because misappropriation, theft, and embezzlement do not necessarily require the quid pro quo of an official action. *See Evans,* 504 U.S. at 258-59, 112 S.Ct. 1881.

The Supreme Court's recent decision in *United States v. Santos,* ___ U.S. ___, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008), does not change our analysis of the statute. In *Santos,* the Supreme Court examined the word "proceeds" as it was used in § 1956. *See id.* at 2023-26. The Court concluded that the term, left undefined in the statute, was ambiguous as to whether it meant "profits" or "receipts," and so defined it in

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[7] The federal bribery statute punishes both one who "corruptly gives, offers or promises anything of value to any public official" and public officials who "corruptly demand[ ], seek[ ], receive[ ], accept [ ] or agree[ ] to receive or accept anything of value." 18 U.S.C. §§ 201(b)(1), (2).

the more defendant-friendly terms of "profits," based on the rule of lenity. *Id.* at 2025.

Critical to the issue here, the Court began its analysis by reaffirming the principle that "[w]hen a term is undefined, we give it its ordinary meaning." *Id.* at 2024. This principle both starts and ends our analysis. The term "extortion" has an ordinary meaning and it is not ambiguous. Unlike the word "proceeds," "extortion" has a common law meaning and federal statutes use the term to mean both extortion by violence and extortion under color of official right. *See, e.g., Evans,* 504 U.S. at 261, 112 S.Ct. 1881; *James v. United States,* 550 U.S. 192, 127 S.Ct. 1586, 1604-05, 167 L.Ed.2d 532 (2007) (Scalia, J. dissenting) (citing the Travel Act, 18 U.S.C. § 1952, the Hobbs Act, 18 U.S.C. § 1951, RICO, 18 U.S.C. § 1961, and the Model Penal Code § 223.4 as examples of statutes with a broad interpretation of "extortion").

Lazarenko has not directed us to any statute where Congress used the word "extortion" and meant only extortion by violence *or* only extortion under color of official right. *Cf. Santos,* 128 S.Ct. at 2024 (observing that Congress "sometimes has defined [proceeds] to mean 'receipts' and sometimes 'profits.'"). The ambiguity that the Court wrestled with in *Santos* is simply absent with respect to "extortion."

E. INTERSTATE TRANSPORTATION OF STOLEN PROPERTY - COUNT 31

Lazarenko also challenges the sufficiency of the evidence for his conviction on count 31 for interstate transportation of stolen property. Count 31 alleges a transfer of $1.8 million from Lazarenko's LIP Handel account in Switzerland to Kiritchenko's ABS Trading account at Bank of America in California. As noted earlier, this charge requires a tracing of the fraud proceeds, not simply a commingled account. What is totally missing here is evidence from the key account at the Hungarian PostaBank, from which the money was transferred into the LIP Handel account.

According to the testimony of the former director of Nikopolsky, Boris Velychko, in 1992, Lazarenko's deputy negotiated for Nikopolsky to loan $2.4 million to a Dutch company, Van der Ploeg, on behalf of Naukovy to purchase wheat. The $2.4 million was transferred to Van der Ploeg's account at ABN Amro Bank in the Netherlands in December 1992. The loan to Naukovy was repaid in local currency, which, according to Velychko, was devalued in 1993. On January 19, 1993, $1.2 million was transferred from the ABN Amro account to Agafonov's account at PostaBank in Hungary. In June 1993, $1.205 million was transferred from the PostaBank account to Lazarenko's LIP Handel account in Switzerland. In July 1994, $1.8 million was transferred from the LIP Handel account to Kiritchenko's ABS Trading account at Bank of America in San Francisco. It is this final

transfer that is charged as the interstate transportation of stolen property in count 31.

Anyone who "transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud" is guilty of interstate transportation of stolen property. 18 U.S.C. § 2314. We will uphold the conviction if, viewing the evidence in the light most favorable to the government, there is sufficient evidence for a rational juror to find guilt beyond a reasonable doubt. *Jackson,* 443 U.S. at 324, 99 S.Ct. 2781.

The ledger from Van der Ploeg's account at ABN Amro shows a transfer of $1.2 million to an account at PostaBank, and the ledger for Lazarenko's LIP Handel at Union Bank of Switzerland shows a receipt of $1.205 million from PostaBank, but the glaring gap is that there are no records from PostaBank at all. The government was unable to produce any documents from PostaBank itself. Lazarenko asserts that this gap is fatal to the government's charge of interstate transportation of stolen property because without those records it is impossible to know whether the $1.205 million that was transferred to LIP Handel was the proceeds of fraud or derived from the proceeds of fraud. We agree.

The district court instructed the jury that to find Lazarenko guilty of interstate transportation of stolen property, the funds that were transferred must

be the proceeds of fraud or derived from the proceeds of fraud. This rule has its roots in *United States v. Poole,* 557 F.2d 531 (5th Cir.1977). There, the defendant, Poole, deposited a check that contained fraudulently-obtained funds into his bank account and then, on the same day, wrote a check on that account for an amount identical to the amount that had been deposited. *Id.* at 533-34. He deposited that check into an out-of-state bank. *Id.* The Fifth Circuit reversed the conviction because the bank account into which Poole deposited the fraudulently-obtained funds had sufficient clean funds to cover the amount of the check that was transported across state lines. *Id.*

The government relies on the Seventh Circuit's ruling in *United States v. Quintanilla,* 2 F.3d 1469 (7th Cir.1993), to argue that it does not matter whether there were sufficient clean funds in the PostaBank account to cover the transfer of $1.205 million to the LIP Handel account. In *Quintanilla,* the defendants were found guilty of defrauding the G. Heileman Brewing Company's corporate sponsorship program and convicted of, among other charges, interstate transportation of stolen property. *Id.* at 1471. Defendant Monreal, the director of the program, devised a scheme to receive kickbacks from organizations who received sponsorship awards. *Id.* The money passed from Heileman to the organization and the organization would, in turn, pass a portion to Monreal. *Id.* Quintanilla was the director of one of the organizations, Operation Search, that had kicked

money back to Monreal. *Id.* Quintanilla argued on appeal that Operation Search had sufficient clean funds in its account each time a kickback check was drawn and transported to Monreal. *Id.* at 1478. The Seventh Circuit rejected this argument. It explained that,

> [t]he evidence at trial showed, and Quintanilla does not dispute, that he agreed to pay Monreal a portion of every Heileman grant that Operation Search received. Accordingly, the ultimate source of the funds used to pay Monreal was Heileman. The evidence also showed that Quintanilla followed Monreal's directions concerning exactly how the kickbacks were to be made; there is no suggestion that these directions were not followed to the last detail. Given the nexus between the Heileman grants and the kickbacks made to Monreal, we do no[t] think § 2314 liability hinges in this case on whether or not Operation Search had sufficient clean funds in its bank account each time a kickback check was drawn and transported across state lines to Monreal.

Id. at 1478-79 (footnote omitted). The court looked at the purpose behind § 2314, and noted specifically that the statute was meant to prevent those who were attempting to "'utilize the channels of interstate commerce make a successful get away.'" *Id.* at 1479 (quoting *United States v. Sheridan*, 329 U.S. 379, 384, 67 S.Ct. 332, 91 L.Ed. 359 (1946)). It concluded that "[l]ooking to the substance of Quintanilla's conduct, it

is apparent that the checks he caused to be transported in interstate commerce represented, and were directly derived from, fraudulently obtained Heileman funds." *Id.*

Quintanilla does not save the government in this case because the evidence of the nexus between the grants and the kickbacks in that case was sufficient. Here, the chain of alleged kickbacks from the wheat deal is missing a few links. More significantly, though, the jury here was instructed in accordance with *Poole* and the government did not object to the premises underlying that decision.

In any event, even if we infer that Lazarenko was connected to the wheat deal because it was negotiated by his deputy and he received a payment that represented approximately fifty percent of the proceeds, PostaBank records are still required for there to be sufficient evidence that Lazarenko's subsequent transfer of $1.8 million to Kiritchenko constituted interstate transportation of stolen property. The government's argument that the transfer of $1.205 million to Lazarenko's LIP Handel account was the proceeds of fraud because the fraud was not complete until the money reached Lazarenko does not persuade us that the PostaBank records are unnecessary.

For the $1.8 million transferred from Lazarenko's LIP Handel account to Kiritchenko's ABS Trading account to be fraudulently-obtained property, it must have contained at least $5,000 of the $2.4 million

transferred to Van der Ploeg in the phony wheat deal. We cannot look only at whether the $1.8 million contained at least $5,000 of the $1.205 million transferred into Lazarenko's LIP Handel account as the government urges because the evidence viewed in the light most favorable to the government shows only that the $1.205 million payment was an extortion payment, i.e., fifty percent of the proceeds from the phony wheat transaction.[8] The fraud was Lazarenko's deputy arranging for Nikopol to give Van der Ploeg $2.4 million to buy wheat that was never purchased. That fraud was completed when the money was transferred to Van der Ploeg.

The record supports an inference that Lazarenko *extorted* $1.205 million from Agafonov, because Lazarenko always extorted half of the profits from businesses. But making an extortion payment and completing a fraud are entirely different propositions. The $1.205 million extortion payment also may have been money derived from the phony wheat deal. Without the records from PostaBank, which would show whether there were clean funds in the account from which Agafonov could make the required payment to Lazarenko, this inference is speculation. In short, the evidence reflects money into the Hungarian account and money out of the account, but missing is evidence about the account itself and whether the

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[8] Kiritchenko testified that Lazarenko worked with everyone 50-50. We give the government the benefit of the inference that Lazarenko worked with Agafonov 50-50 as well.

transferred money was "directly traceable" to the fraud itself. *See Morgan,* 805 F.2d at 1378. Accordingly, we reverse Lazarenko's conviction on count 31.[9]

F. RETROACTIVE MISJOINDER

Lazarenko also appeals the denial of his Rule 33 motion for a new trial. He argues that the government indicted him on the UESU charges, knowing that the charges could not be proven, and then, after the directed verdict of acquittal, used the evidence from the alleged UESU scheme against him in its closing argument, in violation of the doctrine of retroactive misjoinder.[10] He asserts that he was denied the opportunity to respond in his own closing argument to the government's misleading statements.

We review for an abuse of discretion the district court's denial of a motion for a new trial made on the grounds of retroactive misjoinder. *United States v. Aldrich,* 169 F.3d 526, 528 (8th Cir.1999). Although we consider de novo whether a defendant has been deprived of his constitutional right to present closing argument, *see United States v. Igbinosun,* 528 F.3d 387, 391 (5th Cir.2008), a district court's limitation on

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[9] Because we reverse Lazarenko's conviction on this count, we do not need to reach his argument that the government's closing argument was misleading.

[10] This doctrine is closely related to prejudicial spillover. The concepts and terms are often used interchangeably. *See United States v. Vebeliunas,* 76 F.3d 1283, 1293-94 (2d Cir.1996).

a closing argument is reviewed for an abuse of discretion. *United States v. Spillone,* 879 F.2d 514, 518 (9th Cir.1989).

The Federal Rules of Criminal Procedure allow for several offenses and several defendants to be joined in a single indictment. If, however, some of the offenses or defendants are dismissed mid-trial, in some cases the trial court must sever the proceedings in order to protect the defendant from prejudice. *See Schaffer v. United States,* 362 U.S. 511, 514, 80 S.Ct. 945, 4 L.Ed.2d 921 (1960).

As the Second Circuit explained in *Vebeliunas,*

> "'Retroactive misjoinder' arises where joinder of multiple counts was proper initially, but later developments – such as a district court's dismissal of some counts for lack of evidence or an appellate court's reversal of less than all convictions – render the initial joinder improper. In this Circuit, '[t]o invoke retroactive misjoinder,' a defendant 'must show compelling prejudice.' Prejudicial spillover from evidence used to obtain a conviction subsequently reversed on appeal may constitute compelling prejudice."

Vebeliunas, 76 F.3d at 1293-94 (internal citations omitted) (quoting *United States v. Jones,* 16 F.3d 487, 493 (2d Cir.1994)). The First Circuit has set a high bar for proving prejudicial spillover: "[A] claim of prejudicial spillover cannot succeed unless 'a defendant . . . prove[s] prejudice so pervasive that a miscarriage of justice looms.'" *United States v. Trainor,*

477 F.3d 24, 36 (1st Cir.2007) (quoting *United States v. Levy-Cordero,* 67 F.3d 1002, 1008 (1st Cir.1995)).

We have examined the issue of prejudicial spillover in the context of a defendant's motion to sever his trial from a codefendant. In *United States v. Cuozzo,* 962 F.2d 945 (9th Cir.1992), we stated that, "[i]n assessing the prejudice to a defendant from the 'spillover' of incriminating evidence, the primary consideration is whether 'the jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants, in view of its volume and the limited admissibility of some of the evidence.'" *Id.* at 950 (quoting *United States v. Escalante,* 637 F.2d 1197, 1201 (9th Cir.1980)). The trial court's instructions to the jury are a "critical factor" in this assessment. *Cuozzo,* 962 F.2d at 950. Also, "[t]he fact that the jury rendered selective verdicts is highly indicative of its ability to compartmentalize the evidence." *Id.*

At the outset, we reject the government's contention that we have limited the doctrine of retroactive misjoinder only to cases where there is more than one defendant. The government reads *United States v. Anguiano,* 873 F.2d 1314 (9th Cir.1989), too broadly. In *Anguiano,* we held that the trial court did not err in refusing to give a multiple conspiracies instruction where there was a single defendant. *Id.* at 1318. We stated that,

> [a] multiple conspiracies instruction is generally required where the indictment charges

> several defendants with one overall conspiracy, but the proof at trial indicates that a jury could reasonably conclude that some of the defendants were only involved in separate conspiracies unrelated to the overall conspiracy charged in the indictment. The instruction is required because, in such a situation, there is a possibility of prejudicial variance between the indictment and the trial proof. The variance may be prejudicial in a number of ways, but the problem that is of concern here is the possibility of transference or "spillover" of guilt. In this type of situation, one of the defendants argues that he or she was only involved, if at all, in a minor conspiracy that is unrelated to the overall conspiracy charged in the indictment, and that a multiple conspiracies instruction is required in order to ensure that there is no "spillover" of guilt from one defendant to another. However, there is no problem of spillover when, as in this case, the defendant stands trial alone. Accordingly, Anguiano was not entitled to a multiple conspiracies instruction on this basis.

Id. at 1317-18 (internal citations and footnotes omitted). We did not hold broadly that the doctrine of prejudicial spillover is inapplicable where there is only one defendant.

The government's citation to the Seventh Circuit's decision in *United States v. Holzer*, 840 F.2d 1343 (7th Cir.1988), as limiting the applicability of the doctrine of prejudicial spillover or retroactive

misjoinder, also misses the mark. The Seventh Circuit stated that "[n]o rule of evidence is violated by the admission of evidence concerning a crime of which the defendant is acquitted, *provided the crime was properly joined to the crime for which he was convicted and the crimes did not have to be severed for purposes of trial.*" *Id.* at 1349 (emphasis added). The Seventh Circuit thus is consistent with our sister circuits in recognizing that there are circumstances where charges in a trial must be severed to avoid prejudice. *See, e.g., Vebeliunas,* 76 F.3d at 1293-94; *Aldrich,* 169 F.3d at 528. We thus clarify that the doctrine of prejudicial spillover or retroactive misjoinder may apply to a case where there is only one defendant.

Invoking the three-factor test that the Second Circuit developed in *Vebeliunas,* the district court concluded that Lazarenko was not prejudiced by the now-dismissed charges. Under the *Vebeliunas* test, the court considers: (1) whether the evidence was so inflammatory that it would tend to cause the jury to convict on the remaining counts; (2) the degree of overlap and similarity between the dismissed and remaining counts; and (3) a general assessment of the strength of the government's case on the remaining counts. *Vebeliunas,* 76 F.3d at 1294. These factors reasonably address concerns about prejudicial spillover. We adopt these factors and add to them the factors we identified in *Cuozzo* – whether the trial court diligently instructed the jury and whether there is evidence, such as the jury's rendering of selective

verdicts, to indicate that the jury compartmentalized the evidence. *Cuozzo,* 962 F.2d at 950.

The district court did not abuse its discretion in denying Lazarenko a new trial based on prejudicial misjoinder. The court first found that the evidence presented in connection with the UESU and GHP frauds was not inflammatory. It was not persuaded that the jury "threw up their hands" over the $200 million associated with the dismissed counts because the jury deliberated for four days and sent questions to the court. Certainly, the UESU scheme was a significant component of the government's case against Lazarenko. But the evidence of fraud, illegal transfers and coverups was so extensive that evidence of $200 million in allegedly unlawful transfers is hardly more inflammatory than evidence of the other transfers or the evidence that Lazarenko extorted fifty percent of the profits from all the businesses he was involved with. The testimony on the $200 million transfer did not amount to compelling prejudice.

The government does not challenge the district court's ruling that some of the evidence would have been inadmissible if the dismissed counts had been dismissed before trial. *See United States v. Hamilton,* 334 F.3d 170, 182 (2d Cir.2003) ("[P]rejudicial spillover is unlikely if the dismissed count and the remaining counts were either quite similar or quite dissimilar.").

Finally, the district court concluded that the government's case on the remaining counts was

sufficiently strong. The court sent 29 counts to the jury, but overturned the verdict on 15 counts. We have reversed an additional six counts. This issue presents a closer question, but "[i]t is not necessary that the court agree with jury verdicts on all counts to determine that the jury carefully weighed the evidence." *United States v. Stefan*, 784 F.2d 1093, 1101 (11th Cir.1986). Lazarenko has not explained how the evidence related to the dismissed counts was tainted by the UESU evidence. The overall evidence of fraud was strong, although it was incumbent on the government to weave that evidence through the technical threads of multiple counts. That the government was not 100% successful does not undermine the evidence that was airtight.

Lazarenko further argues that the prejudicial impact of the evidence on the dismissed counts was compounded in the government's closing argument. He claims that while the government referred to the scheme in the "indictment," he was prevented from arguing that the single conspiracy alleged in count 1 was not proven because the central allegations – the UESU fraud, the GHP/PMH fraud, and the Dityakovsky [sic] extortion – were not proven. He further asserts that the government improperly referred to the UESU fraud in arguing that Lazarenko was "never engaged in legitimate business," while he was precluded from responding that the funds from UESU were not unlawful.

The jury did not see the indictment and was not informed of the specific allegations in the indictment

related to UESU. The district court gave counsel three guidelines for their closing arguments: (1) counsel could not "implicate the Court and its ruling on the dismissed counts in your argument"; (2) counsel could not "comment on why the theories were no longer before" the jury; and (3) counsel could not "mislead them by way of argument . . . that they can acquit based on the absence" of the UESU counts.

The government's references to the indictment were not improper. The jury was specifically instructed that certain counts were no longer before them, the government stated at the beginning of its closing argument that it was not addressing those counts, and the jury never saw the indictment. With these safeguards in place, the government's mention of "the crimes charged in the indictment," or the schemes "alleged in the indictment," – references that did not mention UESU – did not improperly implicate the dismissed UESU counts.

Lazarenko appears to want it both ways. He argues that he was prevented from countering the government's references to the indictment and that he should have been able to argue that the government failed to prove the single conspiracy and wire fraud allegations that it promised to prove because the evidence did not support the UESU, GHP, PMH, and Dityakovsy [sic] allegations. In his closing argument, Lazarenko's counsel argued,

> [I]s that plan or scheme that the government is now presenting to you, is that the same

> plan or scheme that Mr. Lazarenko was charged with, that the government has been prosecuting in this case?
>
> Is what the government's presented to you in final argument the same scheme that they argued to you the whole case?
>
> Remember, the government argued to you that UESU, UEIL, Itera, prefab houses, Nakosta were all part of the scheme.
>
> Now the government argues, the scheme was Naukovy and Kiritchenko alone. That's the scheme.
>
> We will talk more about this, but the defendant has a constitutional right to be tried on only what he has been charged with, and a constitutional right not to be convicted –

The court then sustained "its own objection to that part of the argument."

Outside the presence of the jury, the court explained its view. The court commented that Lazarenko's counsel had "very deftly for the most part . . . complied" with the guidelines. The court stated, though, that counsel crossed the line when he argued that "the defendant has a right under the Constitution . . . to be convicted on the . . . indictment [returned by the grand jury]." The court stated that "[t]here is nothing in our record that tells them about the grand jury, their function or what they do. . . . I did not want to mislead this jury and have them now consider what the grand jury did or didn't do." The court's objection

was limited to counsel's references to what had or had not been charged. Lazarenko's counsel was not precluded from arguing that the government did not prove the scheme they initially laid out based on the evidence. At that point, the indictment was not in play. It was not improper for the court to limit the closing argument to the evidence.

We also disagree with Lazarenko's assertion that the government improperly relied on the UESU scheme when it argued that Lazarenko had "never engaged in legitimate business." The government argued to the jury that,

> the evidence in this case shows that throughout this period of time the only position the defendant held was an official position. The only thing he did was exercise his official authority.
>
> He was never engaged in any legitimate business. He never received, legitimately, any income from Kiritchenko or from Naukovy State Farms.

The UESU allegations are not implicated in this argument. Not only did the government at the beginning of its argument state that it would not be referring to the UESU counts, the government followed up its statement that Lazarenko did not have any legitimate business by linking that reference to the claim that the income from Kiritchenko and Naukovy was illegal.

At most, the government indirectly suggested that the UESU business was illegitimate. Lazarenko responded by arguing that "the suggestion that money from UESU or Itera or UEIL and Nakosta had an unlawful source is now no longer before you. Those sources are not unlawful." The government did not make a contemporaneous objection, but argued to the court during a break that this statement was inappropriate. The court ruled that counsel could argue using the terms of the jury instructions that certain evidence was "not before" the jury, and stated that "there is more than enough in this record to argue the schemes are not proven based on the weight of the record itself, and that's where the argument ought to be." This ruling did not prevent Lazarenko from dispelling any impression, however faint, that may have been left with the jury that all of Lazarenko's wealth was obtained illegally. Understandably, the district court required that the argument, however, would have to be based on the evidence.

The counts we have dismissed fall of their own weight and those we have affirmed stand on their own. The district court did not abuse its discretion in denying the motion for a new trial based on retroactive misjoinder, nor did the court improperly limit Lazarenko's closing argument.

We affirm Lazarenko's convictions on count 1 for conspiracy, counts 2 through 5 for money laundering, and counts 6 through 8 for money laundering. We reverse Lazarenko's convictions on counts 25 through 29 for wire fraud, and count 31 for interstate

transportation of stolen property. Because we reverse on six of the fourteen counts of which Lazarenko was convicted, we vacate the sentence and remand for resentencing on the remaining eight counts as to which we affirm the conviction.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

United States District Court
Northern District of California

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	Case Number: CR00-0284-01 MJJ
PAVEL LAZARENKO	USM Number: 94430-011
	CCAM Number:
	Defendant's Attorney: Doran Weinberg
	(Filed Dec. 14, 2006)

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[ ] was found guilty on count(s) 1, 2-8, 25-29, and 31 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offense(s):

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1956(h)	Conspiracy to Commit Money Laundering	May 2000	1
18 U.S.C. § 1956(a)(2)	Money Laundering	"	2-5

18 U.S.C. § 1956(a)(1)(B)	Money Laundering	"	6-8
18 U.S.C. §§ 1343 and 1346	Wire Fraud	"	25-29
18 U.S.C. § 2314	Interstate Transportation of Stolen Property	"	31

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____.

[x] Count(s) 20-24, and 43-52 of the Indictment (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

8/25/2006
Date of Imposition of Judgment

/s/ Martin J. Jenkins
Signature of Judicial Officer

Honorable Martin J. Jenkins,
U.S. District Judge
Name & Title of Judge

12/14/2006
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **108 months**, as to each count to be served concurrently.

[ ] The Court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at _____ [ ] am [ ] pm on _____.

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2:00 pm on _____.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years**, as to each count to be served concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain

from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and two periodic drug tests thereafter.

[x] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

[ ] The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check if applicable.)

[ ] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check if applicable.)

[ ] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions in this judgment.

STANDARD CONDITIONS

1) The defendant shall not leave the judicial district without permission of the court or probation officer;

2) The defendant shall report to the probation officer, and shall submit a truthful and complete written report within the first five days of each month;

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) The defendant shall support his or her dependents and meet other family responsibilities;

5) The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere, and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court; and

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1) The defendant shall comply with the rules and regulations of the Bureau of Immigration and Customs Enforcement and, if deported, not reenter the United States without the express consent of the Secretary of the Department of Homeland Security. Upon reentry into the

United States during the period of court ordered supervision, the defendant shall report to the nearest U.S. Probation Office within 72 hours.

2) The defendant shall pay any restitution, fine and special assessment that is imposed by this judgment, and that remains unpaid at the commencement of the term of supervised release.

3) The defendant shall provide the probation officer access to any requested financial information, including tax returns, and shall authorize the probation office to conduct credit checks and obtain copies of income tax returns.

4) The defendant shall not own or possess any firearms, ammunition, destructive devices, or other dangerous weapons.

5) The defendant shall cooperate in the collection of DNA as directed by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
Totals:	$ 1,150.00	$ 10 million	$ TBD

[x] The determination of restitution is deferred until TBD. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals:	$ _____	$ _____	

[ ] Restitution amount ordered pursuant to plea agreement $_____

[ ] The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6, may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, for offenses committed on or after September 13, 1994 but before April 23, 1996.

[ ] The interest requirement is waived for the
[ ] fine [ ] restitution.

[ ] the interest requirement for the
[ ] fine [ ] restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A [x] Lump sum payment of $ 1,150.00 due immediately, balance due to be determined.

[ ] not later than _____ , or

[ ] in accordance with ( ) C, ( ) D, ( ) E, or (x) F below; or

B [ ] Payment to begin immediately (may be combined with ( ) C, ( ) D or, ( ) F below); or

C [ ] Payment in equal (e.g., weekly, monthly, quarterly) installments of $ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D [ ] Payment in equal (e.g., weekly, monthly, quarterly) installments of $ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [ ] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant and co-defendant Names	Case Numbers (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee (if appropriate)

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Effective: May 20, 2009

18 U.S.C.A. § 1956 Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –

> **(A)(i)** with the intent to promote the carrying on of specified unlawful activity; or
>
> **(ii)** with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or
>
> **(B)** knowing that the transaction is designed in whole or in part –
>
> > **(i)** to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
> >
> > **(ii)** to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which

involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States –

> **(A)** with the intent to promote the carrying on of specified unlawful activity; or
>
> **(B)** knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part –
>
> > **(i)** to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
> >
> > **(ii)** to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof

that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent –

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Penalties. –

(1) In general. – Whoever conducts or attempts to conduct a transaction described in

subsection (a)(1) or (a)(3), or section 1957, or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of –

(A) the value of the property, funds, or monetary instruments involved in the transaction; or

(B) $10,000.

(2) Jurisdiction over foreign persons. – For purposes of adjudicating an action filed or enforcing a penalty ordered under this section, the district courts shall have jurisdiction over any foreign person, including any financial institution authorized under the laws of a foreign country, against whom the action is brought, if service of process upon the foreign person is made under the Federal Rules of Civil Procedure or the laws of the country in which the foreign person is found, and –

(A) the foreign person commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States;

(B) the foreign person converts, to his or her own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States; or

(C) the foreign person is a financial institution that maintains a bank account at a financial institution in the United States.

(3) Court authority over assets. – A court may issue a pretrial restraining order or take any other action necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment under this section.

(4) Federal receiver. –

(A) In general. – A court may appoint a Federal Receiver, in accordance with subparagraph (B) of this paragraph, to collect, marshal, and take custody, control, and possession of all assets of the defendant, wherever located, to satisfy a civil judgment under this subsection, a forfeiture judgment under section 981 or 982, or a criminal sentence under section 1957 or subsection (a) of this section, including an order of restitution to any victim of a specified unlawful activity.

(B) Appointment and authority. – A Federal Receiver described in subparagraph (A) –

(i) may be appointed upon application of a Federal prosecutor or a Federal or State regulator, by the court having jurisdiction over the defendant in the case;

(ii) shall be an officer of the court, and the powers of the Federal Receiver shall include the powers set out in section 754 of title 28, United States Code; and

(iii) shall have standing equivalent to that of a Federal prosecutor for the purpose of submitting requests to obtain information regarding the assets of the defendant –

(I) from the Financial Crimes Enforcement Network of the Department of the Treasury; or

(II) from a foreign country pursuant to a mutual legal assistance treaty, multilateral agreement, or other arrangement for international law enforcement assistance, provided that such requests are in accordance with the policies and procedures of the Attorney General.

(c) As used in this section –

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other

disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" includes –

(A) any financial institution, as defined in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder; and

(B) any foreign bank, as defined in section 1 [FN1] of the International Banking Act of 1978 (12 U.S.C. 3101);

(7) the term "specified unlawful activity" means –

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving –

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) murder, kidnapping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16);

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978)); [FN2]

(iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official;

(v) smuggling or export control violations involving –

(I) an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or

(II) an item controlled under regulations under the Export Administration Regulations (15 C.F.R. Parts 730-774);

(vi) an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States; or

(vii) trafficking in persons, selling or buying of children, sexual exploitation of children, or transporting, recruiting or harboring a person, including a child, for commercial sex acts;

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal

official by threatening or injuring a family member), section 152 (relating to concealment of assets; false oaths and claims; bribery), section 175c (relating to the variola virus), section 215 (relating to commissions or gifts for procuring loans), section 351 (relating to congressional or Cabinet officer assassination), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 541 (relating to goods falsely classified), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 554 (relating to smuggling goods from the United States), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 831 (relating to prohibited transactions involving nuclear materials), section 844(f) or (i) (relating to destruction by explosives or fire of Government property or property affecting interstate or foreign commerce), section 875 (relating to interstate communications),

section 922(1) (relating to the unlawful importation of firearms), section 924(n) (relating to firearms trafficking), section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country), section 1005 (relating to fraudulent bank entries), 1006 [FN3] (relating to fraudulent Federal credit institution entries), 1007 [FN3] (relating to fraudulent Federal Deposit Insurance transactions), 1014 [FN3] (relating to fraudulent loan or credit applications), section 1030 (relating to computer fraud and abuse), 1032 [FN3] (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1111 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1201 (relating to kidnaping), section 1203 (relating to hostage taking), section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction), section 1708 (theft from the mail), section 1751 (relating to Presidential assassination), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2252A (relating to child pornography) where the child pornography contains a visual depiction of an actual minor engaging in sexually explicit conduct, section 2260 (production of certain child pornography for

importation into the United States), section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms), section 2319 (relating to copyright infringement), section 2320 (relating to trafficking in counterfeit goods and services), section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), section 2332g (relating to missile systems designed to destroy aircraft), section 2332h (relating to radiological dispersal devices), section 2339A or 2339B (relating to providing material support to terrorists), section 2339C (relating to financing of terrorism), or section 2339D (relating to receiving military-type training from a foreign terrorist organization) of this title, section 46502 of title 49, United States Code, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers

Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 15 of the Food and Nutrition Act of 2008 [7 U.S.C.A. § 2024] (relating to supplemental nutrition assistance program benefits fraud) involving a quantity of benefits having a value of not less than $5,000, any violation of section 543(a)(1) of the Housing Act of 1949 [42 U.S.C.A. § 1490s(a)(1)] (relating to equity skimming), any felony violation of the Foreign Agents Registration Act of 1938, any felony violation of the Foreign Corrupt Practices Act, or section 92 of the Atomic Energy Act of 1954 (42 U.S.C. 2122) (relating to prohibitions governing atomic weapons) [FN4]

ENVIRONMENTAL CRIMES

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.); or

(F) any act or activity constituting an offense involving a Federal health care offense;

(8) the term "State" includes a State of the United States, the District of Columbia, and any

commonwealth, territory, or possession of the United States; and

(9) the term "proceeds" means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate, and, with respect to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may direct, and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury, the Secretary of Homeland Security, and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Secretary of Homeland Security, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as

the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if –

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

(g) Notice of conviction of financial institutions. – If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

(i) Venue. – (1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in –

(A) any district in which the financial or monetary transaction is conducted; or

(B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.

(2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place.

(3) For purposes of this section, a transfer of funds from 1 place to another, by wire or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be charged in any district in which the transaction takes place.

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[1] So in original. Probably should read "section1(b)".

[2] So in original. The second closing parenthesis probably should not appear.

[3] So in original. Probably should be preceded by "section".

[4] So in original. Probably should have a semicolon at the end.

ROBERT S. MUELLER, III (CSBN 59775)
United States Attorney

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. PAVEL IVANOVICH LAZARENKO, a/k/a "Pavlo Ivanovych Lazarenko," Defendant.	No. CR 00-0284-MJJ VIOLATIONS: Title 18, United States Code, § 1956(h) – Conspiracy to Commit Money Laundering; Title 18, United States Code, § 1956(a) – Money Laundering; Title 18, United States Code, § 1343 – Wire Fraud; Title 18, United States Code, § 2314 – Transportation of Stolen Property; Title 18, United States Code, Section 2 – Aiding and Abetting SAN FRANCISCO VENUE

SECOND SUPERSEDING INDICTMENT

(Filed July 19, 2001)

I. INTRODUCTION

1. At all times relevant to this indictment, Pavel Ivanovich Lazarenko, a/k/a/ "Pavlo Ivanovych Lazarenko" (hereafter "Lazarenko"), was a citizen and resident of Ukraine.

2. From March of 1992 through June of 1994, Lazarenko was a Representative of the President of Ukraine in the Dnepropetrovsk District of Ukraine.

3. From June of 1994 through July of 1995, Lazarenko was the Chairman of the Dnepropetrovsk District Council of People's Deputies.

4. From July of 1995 through September of 1995, Lazarenko was the Head of the Dnepropetrovsk District government.

5. From September of 1995 through May of 1996, Lazarenko was the First Vice Prime Minister of Ukraine.

6. On May 28, 1996, Lazarenko became the Prime Minister of Ukraine, a position he held until July 1, 1997.

7. After July 1, 1997, Lazarenko became a member of the Ukrainian Parliament and the head of the Hromada Party.

8. At all times relevant to the charges herein, Peter Nikolayevich Kiritchenko (hereinafter "Kiritchenko" was a citizen of Ukraine.

9. On December 14, 1990, Kiritchenko formed, among other enterprises, a Poland-based firm named Agrosnabsbyt, also known by its English acronym, ASS, Ltd. ("Agrosnabsbyt/ASS"), which engaged in business in Ukraine, Poland, and elsewhere.

10. In 1991, Kiritchenko incorporated ABS Enterprises, Inc., in Delaware, and, in 1994, incorporated

ABS Trading, Inc. in California, which he merged with ABS Enterprises, Inc. ("ABS"). Since 1994 ABS has been wholly owned by Agrosnabsbyt/ASS and engaged in business in the United States, Ukraine, and elsewhere.

11. ABS maintained its offices in San Francisco, California until August 1997, when it moved its offices to Sausalito, California.

12. Since approximately March 1995, Kiritchenko has been a resident of California and the United States.

13. On September 14, 1995, Kiritchenko was named an advisor to Lazarenko, who at the time was First Deputy Prime Minister, by Directive No. 586 of the Ukrainian Cabinet of Ministers.

14. On July 12, 1996, Kiritchenko was named as an advisor to then-Prime Minister Lazarenko by Ukrainian Cabinet of Ministers Directive 596. He served as an advisor until he and Lazarenko were dismissed by Ukrainian Cabinet of Ministers Directive 677 on July 3, 1997.

COUNT ONE: (18 U.S.C. § 1956(h) – Conspiracy to Commit Money Laundering)

15. The allegations set forth in Paragraphs One through Fourteen of this Second Superseding Indictment are hereby incorporated by reference.

16. On or about and between January 1992 and June 1999, both dates being approximate and inclusive, in the Northern District of California, and elsewhere, the defendant

PAVEL IVANOVICH LAZARENKO,
a/k/a "Pavlo Ivanovych Lazarenko,"

together with Peter Nickolayevich Kiritchenko and others, did knowingly and intentionally conspire to conduct and attempt to conduct financial transactions affecting interstate and foreign commerce, which transactions involved the proceeds of specified unlawful activity, to wit – extortion as specified in 18 U.S.C. § 1956(c)(7)(B)(ii); wire fraud in violation of 18 U.S.C. § 1343 and § 1346; and receipt and transfer of property that was stolen, unlawfully converted, and taken by fraud in violation of 18 U.S.C. § 2314 and § 2315 – knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of the specified unlawful activity, and while conducting and attempting to conduct such financial transactions knowing that the property involved in the financial transactions represented the proceeds of some form of unlawful activity, in violation of 18 U.S.C. §1956(a)(1) and (2).

II. THE MANNER AND MEANS OF THE CONSPIRACY

17. It was part of the conspiracy that Lazarenko, as a government official in Ukraine,

would engage in various acts of extortion and fraud, and would receive funds that had been stolen, converted and taken by fraud, and would transfer the proceeds of this activity into bank accounts in Switzerland, Antigua, Poland, the United States, and elsewhere.

18. It was further part of the conspiracy that Lazarenko induced Kiritchenko to assist Lazarenko to open bank accounts in Switzerland, Antigua, Poland, and the United States, and to transfer the proceeds of fraud and extortion into and out of these bank accounts in an effort to conceal and disguise the nature, location, source, ownership, and control of the proceeds of the specified unlawful activity.

A. The Extortion and Frauds

1. The Extortion

19. It was part of the conspiracy that Lazarenko, while a government official in Ukraine, obtained property, including money and ownership interests in certain companies, from individuals and entities, with their consent, induced by wrongful use of actual or threatened fear of economic harm, and under color of official right.

a. Beginning sometime in 1992, when Lazarenko was a Representative of the President of Ukraine in Dnepropetrovsk, he met with Kiritchenko and by threat of economic harm and under color of official right induced Kiritchenko to transfer to a

relative of Lazarenko's a 50% interest in Agrosnabsbyt/ASS, which was doing business in Ukraine, and to pay Lazarenko 50% of the profits of the business.

1) In approximately January 1993, Kiritchenko transferred a 50% interest in Agrosnabsbyt/ASS to Ekaterina S. Karova, a relative of Lazarenko, and transferred $40,000 to an account controlled by Lazarenko.

2) Thereafter, Kiritchenko transferred 50% of the profits of the business to accounts controlled by Lazarenko as Lazarenko's "share" of the profits of Kiritchenko's business in Ukraine.

b. Beginning sometime in 1993, when Lazarenko was a Representative of the President of Ukraine in Dnepropetrovsk, he met with Alexei Alexandrovich Dityatkovsky (hereinafter "Dityatkovsky"), who at that time was a resident of Ukraine, and by threat of economic harm and under color of official right induced Dityatkovsky to transfer to Lazarenko a 50% interest in his business activity in Ukraine and to pay Lazarenko a percentage of the profits of the business.

1) Dityatkovsky thereafter registered a company, called Dnepronoft, and gave Lazarenko a 50% interest in that company, which interest was held in the name of Lazarenko's former driver and associate, Leonid Gadyatsky.

2) Thereafter, Dityatkovsky transferred a percentage of the profits of his business to accounts controlled by Lazarenko.

2. The Frauds

a. Lazarenko Transferred Money That Had Been Stolen, Converted and Taken By Fraud

1) The Naukovy Fraud

20. It was further part of the conspiracy that Lazarenko, while a government official in Ukraine, received and transferred money that had been stolen, converted and taken by fraud from Ukraine as follows:

a. From at least approximately 1992 Mykola Agafonov was the director of Naukovy State Farm, a Ukrainian government enterprise located in Dnepropetrovsk, Ukraine, that produced milk and dairy products.

b. During the time that Lazarenko was a government official in Dnepropetrovsk, Naukovy State Farm received certain benefits and privileges from the government of Ukraine, including the right to export from Ukraine metal products and raw materials produced by other Ukrainian state enterprises.

c. During 1992, Agafonov entered into a business relationship with Van der Ploeg von Terpstra, B.V., in Leeuwarden, The Netherlands, a

producer of dairy cattle, milking equipment, and related products. Sometime prior to January 1993, Rienz Van der Ploeg, the director of Van der Ploeg von Terpstra, made available Van der Ploeg's foreign currency account at ABN Amro Bank in Leeuwarden for use by Agafonov. Thereafter, money derived from the sale of Ukrainian metal products and raw materials was deposited into that account on behalf of Naukovy State Farm.

d. During 1992, Lazarenko, through his deputy, instructed the director of Nikopolsky Metal Works factory in Dnepropetrovsk to transfer $2,400,000 from Nikopolsky's hard currency account to the Van der Ploeg ABN Amro account. Lazarenko told the deputy that this money was to be used to buy wheat, but no wheat was ever purchased with the money. Instead, on January 19, 1993, $1,200,000 of the money was transferred from the ABN Amro account to an account in Hungary opened by Agafonov, and on June 9, 1993, $1,205,000 was transferred from this account to an account controlled by Lazarenko in Fribourg, Switzerland. Thereafter, Lazarenko caused the transfer of these funds, among others, to bank accounts in the United States, including a transfer of $1,800,000 on July 1, 1994 to an account at Bank of America in San Francisco, California.

e. Between 1992 and 1994, Agafonov, on behalf of Naukovy State Farm, entered into a series of agreements with Van der Ploeg for the purchase of cattle and other related supplies by Naukovy State Farm, pursuant to which the cattle and other related

supplies were to be paid for in part with Ukrainian government funds and in part from the proceeds of the sale of metal products and raw materials from state enterprises exported from Ukraine.

f. Between 1992 and 1994, approximately $38,000,000 of the proceeds from the sale of metals and raw materials, which were sold by or on behalf of Naukovy State Farm, were deposited into Van der Ploeg's ABN Amro account.

g. Between 1992 and 1994, Agafonov expended approximately $13,000,000 of these proceeds to purchase cattle and other supplies for Naukovy State Farm.

h. Between 1992 and 1994, Agafonov transferred a portion of the proceeds of the sale of metals and raw materials into accounts controlled by Lazarenko. The transfers to Lazarenko included a transfer on January 24, 1994 of $2,972,000 and on March 8, 1994 of $4,000,000 to an account in Zurich, Switzerland; and a transfer on November 22, 1994 of $6,014,000 to an account in Geneva, Switzerland, which was subsequently transferred to another account in Switzerland controlled by Lazarenko.

i. Beginning in 1993, Agafonov asked Rienz Van der Ploeg to sign false contracts written in Russian which falsely represented the value of cattle supplied by Van der Ploeg to Naukovy to be approximately $2,400 per head, whereas in fact the actual value of the cattle was approximately $1,300 per head, and which falsely represented that Naukovy

had purchased millions of other goods, whereas in fact such goods had not been purchased. These contracts were subsequently kept in the files of Naukovy State Farm, thereby falsely representing that money received from the sale of metals and raw materials had been spent to acquire cattle and other goods for Naukovy State Farm, when in fact the money had been paid to Agafonov, Lazarenko, and others.

2) The UESU Frauds

22. It was further part of the conspiracy that Lazarenko, when he was the First Vice Prime Minister and the Prime Minister of Ukraine, received and transferred money that had been stolen, converted and taken by fraud in connection with the distribution of natural gas in Ukraine, as follows:

a. In approximately September 1995, Lazarenko, as First Vice Prime Minister of Ukraine, became responsible for the energy section in the Ukrainian government.

b. Beginning in approximately December 1995, a Ukrainian company called United Energy Systems of Ukraine ("UESU"), which was created on November 20, 1995 by Yulia Tymoshenko, an associate of Lazarenko's, was designated by the Ukrainian government as one of several companies to supply natural gas to Ukraine. UESU was given the authority to distribute natural gas to the Dnepropetrovsk region of Ukraine.

c. From approximately December 1995 until sometime in 1997, UESU received deliveries of natural gas from RAO Gazprom pursuant to contracts entered on December 29, 1995 and December 31, 1996 between RAO Gazprom, UESU, and others.

d. Beginning in approximately January 1996, UESU fraudulently conveyed title to the imported natural gas to United Energy International, Ltd. ("UEIL"), an 85% shareholder of UESU that was created on October 17, 1995, in London, England by a Turkish national named Ercument Aksoy, at the direction of Yulia Tymoshenko, and fraudulently diverted to foreign bank accounts belonging to UEIL the payments from Ukrainian customers for the natural gas delivered by UESU.

e. Between April 8, 1996 and December 31, 1996, rather than pay RAO Gazprom for the delivered gas with the money that had been transferred to UEIL, UEIL transferred approximately $140,000,000 to Somolli Enterprises, a Cypriot company that was registered in Cyprus on October 8, 1992, and was controlled by Yulia Tymoshenko and others.

f. Between April 1996 and June 1997, Somolli Enterprises and UESU transferred a total of approximately $97,000,000 into accounts that were controlled by Kiritchenko in Switzerland, Poland, and the United States, including transfers totaling approximately $13,000,000 to bank accounts in the Northern District of California.

g. Between February of 1996 and September of 1997, the money from Somolli, along with other funds, totaling more than $120,000,000 was transferred from Kiritchenko's accounts into accounts controlled by Lazarenko in Switzerland and Antigua.

h. Thereafter, Lazarenko transferred portions of these funds from Switzerland into bank accounts in the Northern District of California, including two transfers of $14,000,000 each on August 1, 1997.

3) The PMH/GHP Fraud

23. It was further part of the conspiracy that Lazarenko, while he was the Prime Minister of Ukraine, received and transferred money that had been stolen, converted and taken by fraud by GHP Corporation, as follows:

a. GHP Corporation was incorporated in Panama on June 14, 1996, and was controlled by Lazarenko and by Kiritchenko pursuant to a power of attorney.

b. During 1997, as Prime Minister of Ukraine, Lazarenko exercised his official authority in favor of GHP Corporation by ensuring that the Ukrainian Cabinet of Ministers entered a contract with GHP Corporation for the purchase of six prefabricated homes.

c. On January 24, 1997, GHP Corporation entered into a contract with Pacific Modern Homes

("PMH") of Elk Grove, California, in which GP Corporation agreed to purchase six prefabricated homes for a total price of $524,763, to be shipped to the Ukrainian Cabinet of Ministers by PMH.

d. On January 27, 1997, GHP Corporation entered into a contract with the Ukrainian Cabinet of Ministers in which GHP Corporation agreed to sell to the government of Ukraine six prefabricated homes for a total price of $1,416,000.

e. When the homes were delivered to Ukraine, representatives of GHP Corporation presented false invoices to the Kiev Regional Customshouse to make it appear as though GHP Corporation was the shipper of the homes and had paid $1,416,000, as provided in the contract between GHP Corporation and the Ukrainian Cabinet of Ministers, when in fact PMH had shipped the homes and the homes actually cost only $524,763.

f. To pay for the homes, two wire transfers were made from Ukrainian government accounts to a GHP account in Switzerland, the first on January 30, 1997 and the second on March 18, 1997, for $708,000 each, or $1,416,000 total.

g. One half of the difference of $889,749 between the price paid for the homes by GHP Corporation and the price paid for the homes by the Ukrainian Cabinet of Ministers was transferred to accounts controlled by Lazarenko.

b. Lazarenko Devised a Scheme and Artifice to Defraud, to Obtain Money by False and Fraudulent Pretenses, and to Deprive the People and Government of Ukraine of Their Right to his Honest and Faithful Services.

24. It was further part of the conspiracy that Lazarenko, while a government official in Ukraine, devised a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, and to deprive the people and government of Ukraine of their right to his honest and faithful services as more fully set forth below in Paragraphs Thirty-Two through Thirty-Eight, and knowingly caused wire transfers of funds into bank accounts in the Northern District of California, as set forth below in Paragraph 40, and thereafter conducted financial transactions involving the proceeds of this fraud.

B. The Means of Disguising and Concealing Payments of Money

25. It was further part of the conspiracy that Lazarenko, while a government official in Ukraine and continuing until 1999, devised a means of disguising and concealing the money he was receiving from extortion and fraud including, but not limited to, the payments described above, by creating and causing the creation of various shell corporations and bank accounts into which he would deposit or direct the deposit of money from individuals and businesses

in Ukraine, and from which he would transfer or direct the transfer of money to himself or to entities he controlled.

1. The Swiss Bank Accounts

a. In March 1993, Lazarenko opened Account No. [Financial Account Number Omitted] at Union Bank of Switzerland in Fribourg, Switzerland in the name of LIP Handel A.G.

b. Beginning sometime in 1994, Kiritchenko, upon Lazarenko's instructions, opened and/or managed bank accounts Kiritchenko and Lazarenko established in Switzerland and Poland to receive and transfer the money Lazarenko received from extortion and fraud, including, but not limited to, the payments described above, in order to conceal and disguise the nature, origin, location, source, ownership and control of the money that was paid for the benefit of Lazarenko.

c. The accounts opened and managed by Kiritchenko included: accounts in the name of GHP Corporation at Banque SCS Alliance (Account No. [Financial Account Number Omitted]) and at Banque Populaire Suisse (Account No. [Financial Account Number Omitted]); accounts in the name of ORPHIN, SA at American Bank in Poland (Account [Financial Account Number Omitted]) and at Banquo Populaire Suisse (Account No. [Financial Account Number Omitted]); an account in the name of Bainfield Company, Ltd. at Banque SCS Alliance (Account No.

[Financial Account Number Omitted]); an account in the name of WILNORTH, Inc. at Banque SCS Alliance (Account No. [Financial Account Number Omitted]); and an account in the name of PADDOX INDUSTRIES at Credit Suisse (Account No. [Financial Account Number Omitted]).

d. Beginning in 1994, Lazarenko caused money to be deposited into Kiritchenko's accounts, and thereafter directed Kiritchenko to transfer into accounts controlled by Lazarenko the money Lazarenko received from extortion and fraud, including, but not limited to, the payments described above, in order to conceal and disguise the nature, origin, location, source, ownership and control of the money that was paid for the benefit of Lazarenko.

e. The accounts opened and controlled by Lazarenko included: an account in the name of KATO-82 at Credit Lyonnais (Suisse) (Account No. [Financial Account Number Omitted]); an account in the name of CARPO-53 at Banque SCS Alliance (Account No. [Financial Account Number Omitted]); an account in the name of NIHPRO at Banque Populaire Suisse (Account No. [Financial Account Number Omitted]), and later at Credit Suisse (Account No. [Financial Account Number Omitted]); an account in the name of Lady Lake at Bank SCS Alliance (Bahamas) (Account No. [Financial Account Number Omitted]); and an account in the name of Fairmont Group, Ltd. at Bank SCS Alliance (Bahamas) (Account No. [Financial Account Number Omitted]).

2. European Federal Credit Bank in Antigua

f. Between May and August of 1997, Kiritchenko and Lazarenko began negotiations to purchase and purchased a majority share of European Federal Credit Bank in St. John's, Antigua (hereinafter "Eurofed") in order to facilitate the transfers of money and to further conceal and disguise the nature, origin, location, source, ownership and control of the money that was paid for the benefit of Lazarenko.

g. Between May and September 1997, Lazarenko transferred or caused the transfer of approximately $95,000,000 that Lazarenko had previously received from extortion and fraud including, but not limited to, the payments described above, into accounts he and Kiritchenko controlled at Eurofed. These accounts were used in part to conceal and disguise the nature, origin, location, source, ownership and control of the money paid for the benefit of Lazarenko and these accounts included: an account controlled by Kiritchenko in the name of ORPHIN (Account No. [Financial Account Number Omitted]); an account controlled by Lazarenko in the name of Lady Lake (Account No. [Financial Account Number Omitted]); an account controlled by Lazarenko in the name of Fairmont (Account No. [Financial Account Number Omitted]); an account controlled by Lazarenko in the name of Guardian Investments Group, Ltd. (Account No. [Financial Account Number Omitted]); an account controlled by Lazarenko in the

name of Nemuro Industrial Group, Ltd. (Account No. [Financial Account Number Omitted]); an account controlled by Lazarenko in the name of Firstar (Account No. [Financial Account Number Omitted]); and a personal account of Lazarenko's (Account No. [Financial Account Number Omitted]).

3. Transfers Into The United States

26. Between 1994 and 1999, Kiritchenko and Lazarenko transferred approximately $114,000,000 that Lazarenko had received from extortion and fraud, including, but not limited to, the payments described above, into bank and brokerage accounts in the United States for the purpose of concealing and disguising the nature, origin, location, source, ownership and control of the money that was paid for the benefit of Lazarenko. These accounts included accounts located in the Northern District of California at Commercial Bank of San Francisco; Pacific Bank; Merrill, Lynch, Fenner & Smith; WestAmerica Bank; Bank of America; Fleet Boston Robertson & Stephens; and Hambrecht & Quist.

All in violation of Title 18, United States Code, Section 1956(h).

COUNTS TWO THROUGH FIVE: (18 U.S.C. § 1956(a)(2) – Money Laundering)

27. The allegations in Paragraphs One through Fourteen and Seventeen through Twenty-Six of this

Second Superseding Indictment are hereby incorporated by reference.

28. On or about the specific dates set forth below, in the Northern District of California and elsewhere, the defendant

PAVEL IVANOVICH LAZARENKO,
a/k/a "Pavlo Ivanovych Lazarenko,"

aid transport, transmit, and transfer, and attempt to transport, transmit and transfer, funds from a place in the United States to or through a place outside the United States, and to a place in the United States from or through a place outside the United States, that is, the wire transfers of money as set forth below, knowing that the funds involved in the transportation, transmission, and transfers represented the proceeds of some form of unlawful activity, and knowing that such transportation, transmission, and transfers were designed in whole or in part to conceal and disguise the nature, source, ownership and control of the proceeds of specified unlawful activity, to wit: receipt and transfer of property that was stolen, unlawfully converted, and taken by fraud in violation of 18 U.S.C. § 2314 and § 2315; extortion as specified in 18 U.S.C. § 1956(c)(7)(B)(ii); and wire fraud in violation of 18 U.S.C. § 1343 and § 1346:

COUNT	DATE	FINANCIAL TRANSACTION
2	7/11/94	Wire transfer of $1,510,000 from ABS Trading Bank of America account number [Financial Account Number Omitted] in

		San Francisco, CA, to CARPO-53 account number [Financial Account Number Omitted] at Banque SCS Alliance in Geneva, Switzerland
3	8/18/94	Wire transfer of $968,000 from ABS Trading Bank of America account number [Financial Account Number Omitted] in San Francisco, CA, to CARPO-53 account number [Financial Account Number Omitted] at Banque SCS Alliance in Geneva, Switzerland
4	12/12/94	Wire transfer of $1,963,000 from AES Trading Bank of America account number [Financial Account Number Omitted] in San Francisco, CA, to CARPO-53 account number [Financial Account Number Omitted] at Banque SCS Alliance in Geneva, Switzerland
5	1/4/95	Wire transfer of $2,210,000 from ABS Trading Bank of America account [Financial Account Number Omitted] in San Francisco, CA to NIHPRO account number [Financial Account Number Omitted] at Banque Populaire Suisse in Geneva, Switzerland

All in violation of Title 18, United States Code, Sections 1956(a)(2) and 2.

COUNTS SIX THROUGH EIGHT: (18 U.S.C. § 1956(a)(1)(B) – Money Laundering)

29. Paragraphs One through Fourteen and Seventeen through Twenty-Six of this Second Superseding Indictment are hereby incorporated by reference.

30. On or about the specific dates set forth below, in the Northern District of California and elsewhere, the defendant

PAVEL IVANOVICH LAZARENKO,
a/k/a "Pavlo Ivanovych Lazarenko,"

did knowingly conduct and attempt to conduct financial transactions affecting interstate and foreign commerce, that is, the financial transactions set forth below, which transactions involved the proceeds of a specified unlawful activity, to wit: receipt and transfer of property that was stolen, unlawfully converted, and taken by fraud in violation of 18 U.S.C. § 2314 and § 2315; extortion as specified in 18 U.S.C. § 1956(c)(7)(B)(ii); and wire fraud in violation of 18 U.S.C. § 1343 and § 1346, knowing that the transactions were designed in whole or in part to conceal and disguise the nature, source, ownership and control of the proceeds of the specified unlawful activity, and knowing that the property involved in the financial transaction as set forth below

represented the proceeds of some form of unlawful activity:

COUNT	DATE	FINANCIAL TRANSACTION
6	11/21/97	Wire transfer of $6,000,000 from European Federal Credit bank account number [Financial Account Number Omitted] at Commercial Bank of San Francisco to European Federal Credit Bank account number [Financial Account Number Omitted] at Hambrecht & Quist
7	8/31/98	Cashier's check for $6,745,000 drawn on Dugsbery, Inc.'s WestAmerica Bank account number [Financial Account Number Omitted], deposited into First American Title Co. escrow account for the purchase of a residence located at [Home Address Omitted], Novato, California
8	9/9/98	A transfer of $2,300,000 from the Dugsbery, Inc. WestAmerica bank account number [Financial Account Number Omitted] to Dugsbery, Inc. account number [Financial Account Number Omitted] at Bank Boston Robertson Stephens

All in violation of Title 18, United States Code, Sections 1956(a)(1)(B) and 2.

COUNTS NINE THROUGH THIRTY: (18 U.S.C. § 1343 and § 1346 – Wire Fraud)

31. The allegations in Paragraphs One through Fourteen and Seventeen through Twenty-Six of this Second Superseding Indictment are hereby incorporated by reference.

The Scheme to Defraud

32. On or about and between January 1992 and June 1998, in the Northern District of California and elsewhere, the defendant

PAVEL IVANOVICH LAZARENKO,
a/k/a "Pavlo Ivanovych Lazarenko,"

did knowingly devise, attempt to devise, and aid and abet in devising, a scheme and artifice to defraud the people of Ukraine, to obtain money and property by means of false and fraudulent pretenses, representations, and promises, and to deprive the people of Ukraine of his honest and faithful services, in violation of Title 18, United States Code, Sections 1343, 1345 and 2.

33. It was part of the scheme to defraud that Lazarenko, while a government official in Ukraine, received an ownership interests [sic] in certain companies doing business in Ukraine and with Ukrainian state enterprises, including, but not limited to, the following companies:

a. In approximately 1993, when he was the Representative of the President of Ukraine in the

Dnepropetrovsk, Lazarenko obtained an ownership interest in Agrosnabsbyt/ASS.

b. In approximately 1993, when he was the Representative of the President of Ukraine in the Dnepropetrovsk, Lazarenko received an ownership interest in Dneproneft.

c. In approximately 1994 Lazarenko received an ownership interest in GHP Corporation.

34. It was further part of the scheme to defraud that Lazarenko, while a government official in Ukraine, exercised his official authority and influence in favor of, and to induce the grant of certain government benefits and privileges to, these and other entities doing business in Ukraine and with Ukrainian state enterprises, by taking certain official action, including, but not limited to, the following:

a. In 1994, when he was the Representative of the President in Dnepropetrovsk; Lazarenko signed the "Direction by the Representative of the President of Ukraine of March 22, 1994, No. 100," pursuant to which various entities, including Agrosnabsbyt, Dneproneft, Naukovy State Farm, and "Cube," a company owned and controlled by Yulia Tymoshenko, received the right to export valuable state-owned commodities from Ukraine.

b. In 1995, when he was the First Vice Prime Minister in charge of the energy sector, Lazarenko exercised his official authority to advance the business interests of UESU so that UESU

obtained the right to sell and distribute natural gas to certain commercial and state enterprises in the Dnepropetrovsk region of Ukraine.

c. On December 31, 1996, when he was the Prime Minister of Ukraine, Lazarenko signed an authorization allowing Government Minister Anatoly Minchenko to execute on behalf of the government of Ukraine a $200,000,000 guaranty in favor of RAO Gazprom for delivery of natural gas by UESU to Ukraine, thereby causing the Ukranian government to pledge to use state funds to repay the debts of UESU to RAO Gazprom.

35. It was further part of the scheme to defraud that between 1993 and 1997 while a public official in Ukraine, Lazarenko received over $200,000,000 from various companies doing business in Ukraine and with Ukrainian state enterprises including, but not limited to, the following approximate amounts:

a. In 1996, Lazarenko received at least $84,000,000 from Somolli Enterprises.

b. In 1996, Lazarenko received at least $65,000,000 from UEIL.

c. Between 1994 and 1998, Lazarenko received at least $30,000,000 from Agrosnabsbyt/ASS.

d. In 1996, Lazarenko received at least $25,000,000 from Itera Corporation.

e. Between 1993 and 1994, Lazarenko received at least $14,000,000 from Naukovy State Farm.

f. In 1997, Lazarenko received at least $13,000,000 from UESU.

g. Between 1993 and 1996 Lazarenko received at least $5,000,000 from Dneproneft.

h. In 1997, Lazarenko received at least $400,000 from GHP Corporation.

i. In 1994, Lazarenko received at least $375,000 from Nakosta.

36. It was further part of the scheme to defraud that Lazarenko established various off-shore bank accounts under coded names into which he deposited money he received from the entities doing business in Ukraine and with Ukrainian state enterprises, including, but not limited to, the bank accounts described in Paragraph Twenty-Five, and he failed to disclose the existence of these accounts or his control of the funds in these accounts to the people of Ukraine in violation of the laws of Ukraine.

37. It was further part of the scheme to defraud that Lazarenko, while he was a public official in Ukraine, failed to disclose to the people of Ukraine that he had an ownership interest in and was receiving money and property from companies described above in Paragraph Thirty-Five by making false representations about his ownership interest in companies and the income he received, in violation of

the laws of Ukraine, including, but not limited to, the following false representations:

a. On or about November 20, 1997, Lazarenko falsely represented to the people and government of Ukraine that his total income for the year 1996 was 9,397 hryvni (the Ukrainian national currency), or approximately $5,040, that he had no income from any business activities, and that he had no money in any banks or other financial institutions, when in fact he had ownership interests in companies doing business in Ukraine and in 1996 he received more than $165,000,000 into bank accounts that he controlled.

b. On or about January 6, 1998, Lazarenko falsely represented to the people and government of Ukraine that his total income for the year 1997 was 10,386 hryvni (the Ukrainian national currency), or approximately $5,570, that he had no income from any business activities, and that he had no money in any banks or other financial institutions, when in fact in 1997 he received more than $15,000,000 into bank accounts that he controlled.

38. As a result of the scheme to defraud, the people of Ukraine were deprived of money and of their right to Lazarenko's honest services as a Ukrainian public official.

The Wire Communications

39. The allegations in Paragraphs One through Fourteen, Seventeen through Twenty-Six, and Thirty-Two through Thirty-Eight of this Second Superseding Indictment are hereby incorporated by reference.

40. On or about the dates set forth below, in the Northern District of California and elsewhere, the defendant

PAVEL IVANOVICH LAZARENKO,
a/k/a "Pavlo Ivanovych Lazarenko,"

for the purpose of executing the scheme and artifice to defraud set forth above, and attempting to do so, did knowingly transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce, the following wire transfers:

COUNT	DATE	WIRE COMMUNICATION
9	5/26/97	Wire transfer of $2,998,000 from First Trading Bank's correspondent account number [Financial Account Number Omitted] at Commercial Joint Stock Bank Slaviansky to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]

10	5/28/97	Wire transfer of $1,662,000 from First Trading Bank's correspondent account number [Financial Account Number Omitted] at Commercial Joint Stock Bank Slaviansky to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
11	5/29/97	Wire transfer of $394,000 from First Trading Bank's correspondent account number [Financial Account Number Omitted] at Commercial Joint Stock Bank Slaviansky to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
12	6/3/97	Wire transfer of $1,530,000 from First Trading Bank's correspondent account number [Financial Account Number Omitted] at Commercial Joint Stock Bank Slaviansky to

		European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
13	6/2/97	Wire transfer of $2,200,000 from First Trading Bank's correspondent account number [Financial Account Number Omitted] at Commercial Joint Stock Bank Slaviansky to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
14	6/4/97	Wire transfer of $500,000 from First Trading Bank's correspondent account number [Financial Account Number Omitted] at Commercial Joint Stock Bank Slaviansky to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit

		Bank account number [Financial Account Number Omitted]
15	6/5/97	Wire transfer of $170,000 from First Trading Bank's correspondent account number [Financial Account Number Omitted] at Commercial Joint Stock Bank Slaviansky to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
16	6/6/97	Wire transfer of $1,000,000 from First Trading Bank's correspondent account number [Financial Account Number Omitted] at Commercial Joint Stock Bank Slaviansky to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
17	6/9/97	Wire transfer of $510,000 from First Trading Bank's correspondent account number [Financial Account Number

		Omitted] at Commercial Joint Stock Bank Slaviansky to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
18	6/10/97	Wire transfer of $2,000,000 from First Trading Bank's correspondent account number [Financial Account Number Omitted] at Commercial Joint Stock Bank Slaviansky to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
19	6/11/97	Wire transfer of $1,036,000 from First Trading Bank's correspondent account number [Financial Account Number Omitted] at Commercial Joint Stock Bank Slaviansky to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the

		Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
20	6/23/97	Wire transfer of $1,400,000 from ORPHIN American Bank in Poland account number [Financial Account Number Omitted] to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
21	7/7/97	Wire transfer of $4,500,000 from ORPHIN American Bank in Poland account number [Financial Account Number Omitted] to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Commercial Bank of San Francisco in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
22	7/11/97	Wire transfer of $3,050,000 from ORPHIN American Bank in Poland account number [Financial Account Number Omitted] to European Federal Credit Bank

		correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
23	7/11/97	Wire transfer of $2,602,000 from ORPHIN American Bank in Poland account number [Financial Account Number Omitted] to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Commercial Bank of San Francisco in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
24	7/30/97	Wire transfer of $8,200,000 from GPP Corporation account number [Financial Account Number Omitted] at Banque SCS Alliance in Geneva, Switzerland to European Federal Credit Bank account [Financial Account Number Omitted] at Merrill Lynch Fermer & Smith in the Northern District of California
25	8/1/97	Wire transfer of $14,000,000 from CARPO-53 account number [Financial Account Number Omitted] at Banque SCS Alliance

		in Geneva, Switzerland to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
26	8/1/97	Wire transfer of $14,000,000 from CARPO-53 account number [Financial Account Number Omitted] at Banque SCS Alliance in Geneva, Switzerland to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Commercial Bank of San Francisco in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
27	11/24/97	Wire transfer of $24,000,000 from European Federal Credit Bank account number [Financial Account Number Omitted] at Credit Suisse in Geneva, Switzerland to European Federal Credit Bank account number [Financial Account Number Omitted] at Hambrecht & Quist in the Northern District of California

28	7/24/98	Wire transfer of $9,000,000 from Lady Lake account number [Financial Account Number Omitted] at Banque SCS Alliance (Bahamas) to European Federal Credit Bank account number [Financial Account Number Omitted] at Commercial Bank of San Francisco in the Northern District of California
29	8/5/98	Wire transfer of $5,300,000 from Lady Lake account number [Financial Account Number Omitted] at Banque SCS Alliance (Bahamas) to Dugsbery, Inc. account number [Financial Account Number Omitted] at WestAmerica Bank in the Northern District of California
30	8/11/98	Wire transfer of $4,000,000 from European Federal Credit Bank account number [Financial Account Number Omitted] at Bankas Hermis in Vilnius, Lithuania to Dugsbery, Inc. account number [Financial Account Number Omitted] at WestAmerica Bank in the Northern District of California

All in violation of Title 18, United States Code, Sections 1343, 1346, and 2.

COUNTS THIRTY-ONE THROUGH FIFTY-THREE:
(18 U.S.C. § 2314 – Transportation of Stolen Property)

41. The allegations in Paragraphs One through Fourteen, Seventeen through Twenty-Six, and Thirty-Two through Thirty-Eight of this Second Superseding Indictment are hereby *incorporated* by reference.

42. On or about the dates set forth below, in the Northern District of California and elsewhere, the defendant

PAVEL IVANOVICH LAZARENKO,
a/k/a "Pavlo Ivanovych Lazarenko,"

did cause to be transported, transmitted, and transferred in interstate and foreign commerce, money of the value of $5,000 or more, in the approximate amounts set forth below, knowing the money to have been stolen, converted, and taken by fraud:

COUNT	DATE	ITEM TRANSFERRED
31	7/1/94	Wire transfer of $1,800,000 from LIP Handel account number [Financial Account Number Omitted] at Union Bank of Switzerland in Geneva, Switzerland to ABS Trading account number [Financial Account Number Omitted] at Bank of America in the Northern District of California

32	5/26/97	Wire transfer of $2,998,000 from First Trading Bank's correspondent account number [Financial Account Number Omitted] at Commercial Joint Stock Bank Slaviansky to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
33	5/28/97	Wire transfer of $1,662,000 from First Trading Bank's correspondent account number [Financial Account Number Omitted] at Commercial Joint Stock Bank Slaviansky to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
34	5/29/97	Wire transfer of $394,000 from First Trading Bank's correspondent account number [Financial Account Number Omitted] at Commercial Joint Stock Bank Slaviansky to European Federal

		Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for Credit to European Federal Credit Bank account number [Financial Account Number Omitted]
35	6/3/97	Wire transfer of $1,530,000 from First Trading Bank's correspondent account number [Financial Account Number Omitted] at Commercial Joint Stock Bank Slaviansky to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
36	6/2/97	Wire transfer of $2,200,000 from First Trading Bank's correspondent account number [Financial Account Number Omitted] at Commercial Joint Stock Bank Slaviansky to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit Bank

		account number [Financial Account Number Omitted]
37	6/4/97	Wire transfer of $500,000 from First Trading Bank's correspondent account number [Financial Account Number Omitted] at Commercial Joint Stock Bank Slaviansky to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Park in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
38	6/5/97	Wire transfer of $170,000 from First Trading Bank's correspondent account number [Financial Account Number Omitted] at Commercial Joint Stock Bank Slaviansky to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
39	6/6/97	Wire transfer of $1,000,000 from First Trading Bank correspondent account number [Financial Account Number Omitted] at

		Commercial Joint Stock Bank Slaviansky to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
40	6/9/97	Wire transfer of $510,000 from First Trading Bank's correspondent account number [Financial Account Number Omitted] at Commercial Joint Stock Bank Slaviansky to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
41	6/10/97	Wire transfer of $2,000,000 from First Trading Bank's correspondent account number [Financial Account Number Omitted] at Commercial Joint Stock Bank Slaviansky to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern

		District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
42	6/11/97	Wire transfer of $1,036,000 from First Trading Bank's correspondent account number [Financial Account Number Omitted] at Commercial Joint Stock Bank Slaviansky to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
43	6/23/97	Wire transfer of $1,400,000 from ORPHIN American Bank in Poland account number [Financial Account Number Omitted] to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
44	7/7/97	Wire transfer of $4,500,000 from ORPHIN American Bank in Poland account number [Financial Account Number Omitted] to

		European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Commercial Bank of San Francisco in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
45	7/11/97	Wire transfer of $3,050,000 from ORPHIN American Bank in Poland account number [Financial Account Number Omitted] to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
46	7/11/97	Wire transfer of $2,602,000 from ORPHIN American Bank in Poland account number [Financial Account Number Omitted] to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Commercial Bank of San Francisco in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]

47	7/30/97	Wire transfer of $8,200,000 from GHP Corporation account number [Financial Account Number Omitted] at Banque SCS Alliance in Geneva, Switzerland to European Federal Credit Bank account [Financial Account Number Omitted] at Merrill Lynch Fenner & Smith in the Northern District of California
48	8/1/97	Wire transfer of $14,000,000 from CARPO-53 account number [Financial Account Number Omitted] at Banque SCS Alliance in Geneva, Switzerland to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Pacific Bank in the Northern District of California for credit to European Federal Credit Bank account number [Financial Account Number Omitted]
49	8/1/97	Wire transfer of $14,000,000 from CARPO-53 account number [Financial Account Number Omitted] at Banque SCS Alliance in Geneva, Switzerland to European Federal Credit Bank correspondent account number [Financial Account Number Omitted] at Commercial Bank of San Francisco in the Northern District of California for credit to

		European Federal Credit Bank account number [Financial Account Number Omitted]
50	11/24/97	Wire transfer of $24,000,000 from European Federal Credit Bank account number [Financial Account Number Omitted] at Credit Suisse in Geneva, Switzerland to European Federal Credit Bank account number [Financial Account Number Omitted] at Hambrecht & Quist in the Northern a District of California
51	7/24/98	Wire transfer of $9,000,000 from Lady Lake account number [Financial Account Number Omitted] at Banque SCS Alliance (Bahamas) to European Federal Credit Bank account number [Financial Account Number Omitted] at Commercial Bank of San Francisco in the Northern District of California
52	8/5/98	Wire transfer of $5,300,000 from Lady Lake account number [Financial Account Number Omitted] at Banque SCS Alliance (Bahamas) to Dugsbery, Inc. account number [Financial Account Number Omitted] at WestAmerica Bank in the Northern District of California

53	8/11/98	Wire transfer of $4,000,000 from European Federal Credit Bank account number [Financial Account Number Omitted] at Bankas Hermis in Vilnius, Lithuania to Dugsbery, Inc. account number [Financial Account Number Omitted] at WestAmerica Bank in the Northern District of California

All in violation of Title 18, United States Code, Sections 2314 and 2.

FORFEITURE ALLEGATION: (18 U.S.C. § 982 – Criminal Forfeiture)

43. The allegations contained in Counts One through Eight of this Second Superseding Indictment are hereby realleged and by this reference fully incorporated herein for the purpose of alleging forfeitures pursuant to the provisions of Title 18, United States Code, Section 982(a)(1).

44. As a result of the offenses alleged in Counts One through Eight, Pavel Ivanovich Lazarenko shall forfeit to the United States all property, real and personal, involved in such offense, or any property traceable to such property, including but not limited to, approximately $21,696,000, constituting the laundered proceeds of foreign extortion, wire fraud, and interstate transportation of stolen property, including, but not limited to the following:

a. Real property and improvements located at [Home Address Omitted], Novato, California, and more particularly described in Attachment 1, hereto; and,

b. All funds seized from account number [Financial Account Number Omitted] at Bank Boston Robertson Stephens, in the approximate amount of $266,307.20.

45. By virtue of the commission of the felony offense charged in Count One through Eight of this Second Superseding Indictment by Pavel Ivanovich Lazarenko, any and all interest that Pavel Ivanovich Lazarenko has in the above-described property is vested in the United States and is hereby forfeited to the United States pursuant to Title 18, United States Code, Section 982(a)(1).

46. If any of the property described herein as being subject to forfeiture as a result of any act or omission of the defendant –

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to or deposited with, a third person;

c. has been placed beyond the jurisdiction of the Court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be subdivided without difficulty;

any and all interest Pavel Ivanovich Lazarenko has in other property shall be vested in the United States and forfeited to the United States pursuant to Title 18. United States Code, Section 982(b)(1), up to approximately $21,696,000.

All in violation of Title 18, United States Code, Sections 2314, 1956(h), and 1956(a)(2).

DATED: A TRUE BILL

/s/ _____
FOREPERSON

ROBERT S. MUELLER, III
United States Attorney

/s/ Susan Badger
[for] DAVID W. SHAPIRO
Chief, Criminal Division

(Approved as to form: /s/ Martha Boersch)
AUSA BOERSCH

Supreme Court, U.S.
FILED
SEP 30 2009
OFFICE OF THE CLERK

No. 09-49

In the Supreme Court of the United States

PAVEL IVANOVICH LAZARENKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the indictment in petitioner's case omitted an element of the alleged money laundering offenses.

2. Whether the term "extortion," as used in the federal money laundering statute's definition of "specified unlawful activity," 18 U.S.C. 1956(c)(7)(B)(ii), includes extortion under color of official right and other non-violent forms of extortion.

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In the Supreme Court of the United States

No. 09-49

PAVEL IVANOVICH LAZARENKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-45) is reported at 564 F.3d 1026.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 2008. A petition for rehearing was denied on April 10, 2009 (Pet. App. 1-2). The petition for a writ of certiorari was filed on July 9, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h); seven counts of money laundering, in violation of 18

U.S.C. 1956(a)(1)(B) and (2)(B); five counts of wire fraud, in violation of 18 U.S.C. 1343 (1994) and 18 U.S.C. 1346; and one count of interstate transportation of stolen property, in violation of 18 U.S.C. 2314. He was sentenced to 108 months of imprisonment, to be followed by three years of supervised release. Pet. App. 10, 45-49. The court of appeals affirmed the conspiracy and money laundering convictions, reversed the wire fraud and interstate transportation of stolen property convictions, vacated petitioner's sentence, and remanded for resentencing. *Id.* at 1-45.

1. Petitioner served as a high-ranking public official in Ukraine during the 1990s. Petitioner exploited his government position to "form[] multiple business relationships and engage[] in a tangled series of transactions that netted him millions of dollars." Pet. App. 2-3; see *id.* at 3-8 (describing the five separate arrangements that formed the basis for the charges against petitioner). Petitioner "kept his money in foreign bank accounts, transferring funds from one account to another across the globe in an effort * * * to disguise and conceal the sources and ownership of the proceeds from the Ukrainian people," and the funds "passed through bank accounts in the United States from Swiss, off-shore, and other accounts." *Id.* at 2. Petitioner left Ukraine around February 1999 and subsequently came to the United States. He was arrested in April 1999. Gov't C.A. Br. 22.

2. A grand jury charged petitioner with a single count of conspiracy to commit money laundering (Count 1); seven counts of money laundering, in violation of 18 U.S.C. 1956(a)(2) (Counts 2-5) and 18 U.S.C. 1956(a)(1)(B) (Counts 6-8); 22 counts of wire fraud (Counts 9-30); and 23 counts of interstate transportation

of stolen property (Counts 31-53). Pet. App. 8-9; see *id.* at 74-121 (Second Superseding Indictment). Count 1 alleged that petitioner conspired to commit money laundering by conducting financial transactions that involved the proceeds of extortion, wire fraud, and receipt and transfer of stolen property. *Id.* at 76-91. The substantive money laundering counts were likewise based on the "specified unlawful activities" of:

> receipt and transfer of property that was stolen, unlawfully converted, and taken by fraud in violation of 18 U.S.C. § 2314 and § 2315; extortion as specified in 18 U.S.C. § 1956(c)(7)(B)(ii); and wire fraud in violation of 18 U.S.C. § 1343 and § 1346.

Id. at 92.

Petitioner moved for a bill of particulars identifying the provisions of Ukrainian law that the government alleged that he violated. The district court denied that motion. Gov't C.A. E.R. 62-66. The court stated that petitioner would, "at some point, [be] entitled to know the specific Ukrainian laws which he is accused of violating." *Id.* at 64. The court noted, however, that petitioner was "not being charged pursuant to foreign statutes or laws" and stated that although "a violation of Ukrainian law may be relevant to establishing an element of the alleged offense, * * * it is not the offense itself." *Ibid.* The district court also stated that petitioner had "offer[ed] no legal support for the proposition that such information must be included in the indictment or a bill of particulars." *Ibid.*; see Pet. C.A. E.R. 90-91 (denying petitioner's subsequent motion to dismiss the indictment and reiterating the court's previous rejection of the view "that a violation of foreign law is a necessary 'element' of any of the offenses pled in the indictment");

Gov't C.A. E.R. 70-72 (denying petitioner's motion to preclude the government from attempting to prove certain theories of liability at trial and reiterating the court's previous view that the indictment "adequately alleges the offenses for which [petitioner] * * * is culpable").

Petitioner also moved to dismiss the money laundering charges on the ground "that the extortion allegations could not serve as a specified unlawful activity underlying the charge[s] because only extortion by force, as opposed to extortion under color of office, could be the specified unlawful activity." Pet. C.A. E.R. 55. The district court denied that motion, concluding "that the allegations of extortion, fraud, and interstate transportation of stolen property [contained in the indictment] can service as the specified unlawful activity required under the money laundering statute." *Id.* at 57.

Petitioner was tried before a jury. At the close of the government's case in chief, the district court granted petitioner's motion for a judgment of acquittal on 12 of the 22 counts charging wire fraud and 12 of the 23 counts charging interstate transportation of stolen property. The jury found petitioner guilty on the remaining counts. After the jury's verdict, the district court granted petitioner's renewed motion for a judgment of acquittal with respect to five additional wire fraud counts and ten additional interstate transportation of stolen property counts. The district court declined to disturb the jury's verdict with respect to the one count charging conspiracy to commit money laundering, the seven counts charging money laundering, and one count charging interstate transportation of stolen property. Pet. App. 9-11.

3. The court of appeals affirmed petitioner's conspiracy and money laundering convictions, reversed the wire fraud and interstate transportation of stolen property convictions, vacated petitioner's sentence, and remanded for resentencing. Pet. App. 1-45.

a. The court of appeals rejected petitioner's argument that "the indictment must be dismissed because it failed to allege that his conduct violated Ukrainian law." Pet. App. 11. The court stated that "[a]n indictment is sufficient if it (1) 'contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend' and (2) 'enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *Ibid.* (quoting *Hamling* v. *United States*, 418 U.S. 87, 117 (1974)). It also stated that "[a]n indictment 'should be read in its entirety, construed according to common sense, and interpreted to include facts which are necessarily implied.'" *Ibid.* (quoting *United States* v. *Berger*, 473 F.3d 1080, 1103 (9th Cir. 2007), cert. denied, 128 S. Ct. 874 (2008)).

In this case, the court of appeals noted that "[t]he indictment tracks the statutory language in charging money laundering, wire fraud and interstate transportation of stolen property," language that the court of appeals had previously held "set forth the essential elements of these offenses." Pet. App. 12. The court stated that petitioner was "seek[ing] to import an additional element into these offenses [by] claiming that the Ukrainian law at issue is also an essential element because the government must prove a violation of Ukrainian law to sustain a conviction." *Ibid.* The court of appeals stated that petitioner's "challenge does not achieve novelty status simply because it involves foreign law" and it noted that the general rule is that, "when bringing

charges of money laundering, the government need not allege all the elements of the 'specified unlawful activity,' i.e., the underlying offense." *Ibid.* "Here," the court of appeals explained, "the violation of Ukrainian law is the specified unlawful activity." *Ibid.*

The court of appeals also determined that "the omission of a citation to foreign law" in the indictment had not prejudiced petitioner, noting both that "[t]he indictment provided detailed allegations regarding the basis for the charges, including dates, amounts, account numbers, and sources of the money" and that "the [petit] jury was instructed that it had to find a violation of [Ukrainian] law and was provided with the elements of the relevant [Ukrainian] statutes." Pet. App. 12-13. The court rejected petitioner's reliance on *Richardson* v. *United States*, 526 U.S. 813 (1999), both because this Court did "not comment on the sufficiency of an indictment in *Richardson*" and because "here the indictment identified interstate transportation of stolen property, extortion, and wire fraud as the 'specified unlawful activit[ies]' and provided detailed allegations regarding each of these offenses." Pet. App. 13 (brackets in original).

b. The court of appeals held that the evidence at trial was insufficient to sustain petitioner's convictions for wire fraud (Counts 25-29) and interstate transportation of stolen property (Count 31). Pet. App. 18-21, 28-34. The court rejected petitioner's argument that the reversal of the wire fraud convictions also required reversal of the convictions on the money laundering counts charged in Counts 6-8. *Id.* at 21-22.

c. The court of appeals also rejected petitioner's challenge to the money laundering convictions based on Counts 2-5. Pet. App. 22-27. As the court explained,

Section 1956 "criminalizes the laundering of the proceeds of a 'specified unlawful activity.'" *Id.* at 23. At the time of petitioner's charged conduct, "specified unlawful activity" was defined to include: "with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving * * * extortion." 18 U.S.C. 1956(c)(7)(B) and (B)(ii) (1994).

The court of appeals rejected petitioner's argument "that 'extortion' as it was used in the money laundering statute * * * is limited to extortion through violence" and excludes extortion that "is more akin to bribery" or extortion committed "under color of official right." Pet. App. 23-24. The court cited the "familiar maxim that a statutory term is generally presumed to have its common law meaning," *id.* at 25 (quotation marks omitted) (quoting *Evans* v. *United States*, 504 U.S. 255, 259 (1992)), and it noted that, "[a]t common law, extortion was a crime that resembled what we know as bribery, and involved an abuse of power by a public official," and had only later been "expanded * * * to include the obtaining of property by force," *ibid.* The court of appeals noted that Section 1956(c)(7)(B)(ii) did not "qualify the term in any way that suggests that we should read 'extortion' as excluding the common law definition," *id.* at 25-26, and stated that petitioner "has not directed us to any statute where Congress used the word 'extortion' and meant only extortion by violence *or* only extortion under color of official right," *id.* at 27.

In 2001, after the conduct at issue in this case, Congress amended the definition of "specified unlawful activity" to include "bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official." 18 U.S.C.

1956(c)(7)(B)(iv); see International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001, Pub. L. No. 107-56, Tit. III, § 315(1)(C), 115 Stat. 308. The court of appeals determined that this amendment "does not become superfluous if we read 'extortion' to include extortion under color of official right," because "[b]ribery and extortion under color of official right are not co-extensive." Pet. App. 26; see *ibid.* (noting that "'[b]ribery of a public official' extends to the individual who offers the bribe as well as the public official who accepts the bribe").[1]

ARGUMENT

Petitioner contends (Pet. 5-13) that the omission of an element of a criminal offense from a federal indictment can never constitute harmless error. Petitioner also asserts (Pet. 13-20) that his conduct did not constitute "extortion" for purposes of 18 U.S.C. 1956(c)(7)(B)(ii) (1994). Those claims do not merit further review.

1. The petition for a writ of certiorari should be denied because this case is in an interlocutory posture. The court of appeals reversed six of petitioner's convictions, vacated petitioner's sentence, and remanded for resentencing on the remaining eight counts. Pet. App. 45. Following the district court's final disposition of the case, petitioner will be able to raise his current claims—together with any other claims that may arise during resentencing—in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating

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[1] The court of appeals also rejected petitioner's claim that he was entitled to a new trial on grounds of retroactive misjoinder. Pet. App. 34-44. Petitioner does not renew that claim before this Court.

that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment). The interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial of" the petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari); see also Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002) (noting that this Court routinely denies petitions for a writ of certiorari filed by criminal defendants challenging interlocutory determinations that may be reviewed at the ultimate conclusion of the proceedings and explaining that this practice promotes judicial efficiency).

2. Petitioner contends (Pet. 5-13) that this Court should grant a writ of certiorari to determine whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error. As petitioner notes (Pet. 5), this Court granted review to decide that question three years ago, but it ultimately resolved the case by finding that the indictment in question contained all the elements of the offense and thus presented no harmless-error issue. See *United States* v. *Resendiz-Ponce*, 549 U.S. 102 (2007). The pre-*Resendiz-Ponce* split continues to exist. The majority of the courts of appeals have held that such an omission (or the omission of a sentence-enhancing fact) is subject to harmless-error analysis. See *United States* v. *Allen*, 406 F.3d 940, 943-945 (8th Cir. 2005) (en banc), cert. denied, 549 U.S. 1095 (2006); *United States* v. *Robinson*, 367 F.3d 278, 285-286 (5th Cir.), cert. denied, 543 U.S. 1005 (2004); *United States* v. *Higgs*, 353 F.3d 281, 304-307

(4th Cir. 2003), cert. denied, 543 U.S. 999 (2004); *United States* v. *Trennell*, 290 F.3d 881, 889-890 (7th Cir.), cert. denied, 537 U.S. 1014 (2002); *United States* v. *Cor-Bon Custom Bullet Co.*, 287 F.3d 576, 580-581 (6th Cir.), cert. denied, 537 U.S. 880 (2002); *United States* v. *Prentiss*, 256 F.3d 971, 981-985 (10th Cir. 2001) (per curiam) (en banc); *United States* v. *Corporan-Cuevas*, 244 F.3d 199, 202 (1st Cir.), cert. denied, 534 U.S. 880 (2001). The Third and Ninth Circuits, in contrast, have held that such omissions constitute structural error and require reversal. See *United States* v. *Du Bo*, 186 F.3d 1177, 1179-1181 (9th Cir. 1999); *United States* v. *Spinner*, 180 F.3d 514, 515-516 (3d Cir. 1999).

This case, however, does not present the question on which petitioner seeks review. The court of appeals did not conclude that petitioner's indictment omitted an element of the offense but that the omission was harmless. Instead, the court held that the indictment was not defective in the first place. See Pet. App. 11-13. As a result, this Court could not reach the harmless-error question in this case unless it were first to consider—and then disagree with—the actual basis for the court of appeals' decision.[2]

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[2] As noted in the text, the Ninth Circuit has previously held that the omission of an element of the offense from a federal indictment constitutes structural error. Petitioner suggests that the Ninth Circuit implicitly repudiated *Du Bo* in this case and effectively "held that any error in the failure to allege a foreign offense was harmless in this case." Pet. 10. But that is not what the court of appeals said; instead, it held that "[t]he indictment against [petitioner] was legally sufficient." Pet. App. 13. Even if there were any tension between the Ninth Circuit's decisions in *Du Bo* and in this case—and there is not—an intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Petitioner does not seek this Court's review of the court of appeals' conclusion that "[t]he indictment against [him] was legally sufficient." Pet. App. 13; see Pet i. Petitioner likewise does not assert that that holding conflicts with any decision of another court of appeals. See Pet. 5-9. Further review on that issue is therefore unwarranted.

In any event, the court of appeals correctly held that the indictment in this case was legally sufficient. As the court of appeals explained (Pet. App. 12), an indictment is sufficient if it contains the elements of the offense charged, fairly informs the defendant of the charge against him, and contains sufficient information to enable him to plead an acquittal or conviction as a bar to future prosecutions. See, *e.g.*, *Resendiz-Ponce*, 549 U.S. at 108; *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). An indictment that tracks the language of the statute is generally adequate for these purposes. See, *e.g.*, *United States* v. *Bailey*, 444 U.S. 394, 414 (1980); *Hamling*, 418 U.S. at 117.

In this case, "[t]he indictment track[ed] the statutory language." Pet. App. 12. Compare *id.* at 77, 92, 94, with 18 U.S.C. 1956(a)(1)(B)(i), (2)(B)(i) and (h). Those statutory sections set forth the essential elements of the respective money laundering offenses. See, *e.g.*, *United States* v. *Vanhorn*, 296 F.3d 713, 717-718 (8th Cir. 2002) (so stating with respect to Section 1956(a)(1)(B)(i)), cert. denied, 537 U.S. 1167 (2003); *United States* v. *Ladum*, 141 F.3d 1328, 1341 (9th Cir.) (same), cert. denied, 525 U.S. 898, and 525 U.S. 1021 (1998); *United States* v. *Savage*, 67 F.3d 1435, 1441 (9th Cir. 1995) (so stating with respect to Section 1956(a)(2)(B)(i)), cert. denied, 516 U.S. 1136 (1996); *United States* v. *Carr*, 25 F.3d 1194, 1204 (3d Cir.) (similar), cert. denied, 513 U.S. 939 (1994),

and 513 U.S. 1086 (1995). In addition, "[t]he indictment provided detailed allegations regarding the basis for the charges, including dates, amounts, account numbers, and sources of the money," Pet. App. 13. Accordingly, the indictment contained sufficient information to permit petitioner to prepare a defense to the charges against and to raise a double jeopardy defense against a future prosecution for the same offenses.

Petitioner erroneously contends (Pet. 6-7) that the indictment was defective with respect to the money laundering offenses because it did not allege that his underlying conduct violated Ukrainian law and did not include a citation to "any specific provisions of the Ukrainian Criminal Code." Pet. 6. The crimes with which petitioner was charged, however, were not violations of Ukrainian law; rather, they were violations of the federal money laundering statute. One of the elements of the money laundering offense is that the property involved must be "the proceeds of specified unlawful activity," 18 U.S.C. 1956(a)(1) (1994), or be used "to promote the carrying on of specified unlawful activity," 18 U.S.C. 1956(a)(2)(A). But "the elements of money laundering do not include the elements of the 'specified unlawful activity.'" *United States* v. *Lomow*, 266 F.3d 1013, 1017 (9th Cir. 2001). As a result, a money laundering indictment need not allege the elements of the specified criminal activity. See Pet. App. 12; *United States* v. *Caldwell*, 302 F.3d 399, 413 (5th Cir. 2002); *United States* v. *McGauley*, 279 F.3d 62, 70-71 (1st Cir. 2002); *United States* v. *Mankarious*, 151 F.3d 694, 703 (7th Cir.), cert. denied, 525 U.S. 1056 (1998); *United States*

v. *Smith*, 44 F.3d 1259, 1265 (4th Cir.), cert. denied, 514 U.S. 1113 (1995).[3]

As the court of appeals observed, the district court charged the petit jury "that it had to find a violation of [Ukrainian] law" in order to return a guilty verdict and "provided [the jury] with the elements of the relevant [Ukrainian] statutes." Pet. App. 13. Petitioner asserts that "an element is an element" and "[t]here is no distinction between an element for the purposes of pleading and an element for the purposes of petit jury instructions." Pet. 8-9. But it is far from unusual for a trial court's jury instructions to contain more detailed information about the nature of the charged offense than was contained in the indictment. See, *e.g.*, *United States* v. *Cherry*, 330 F.3d 658, 667-668 (4th Cir. 2003) (upholding money laundering convictions where the indictment had not contained the elements of the specified unlawful activity but the district court had instructed the petit jury about the elements of the specified unlawful activity).

3. Petitioner contends (Pet. 13-20) that his conduct did not constitute "extortion" as that term is used in the federal money laundering statute's definition of "specified unlawful activity" because that term is limited to "extortion by threats of violence." Pet. 15. That claim does not merit further review.

a. Petitioner does not assert that the court of appeals' rejection of his claim about the meaning of the term "extortion" in the pre-2001 version of the money

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[3] Petitioner provides no support for his assertion that "[w]hen the specified unlawful alleged is 'extortion,'" the elements of a federal money laundering offense "include that the offense be 'against a foreign nation.'" Pet. 9 n.1 (quoting 18 U.S.C. 1956(c)(7)(B)(ii) (1994)). In any event, the indictment provided adequate notice by alleging extortion as well as the provision that made extortion a specified unlawful activity.

laundering statute conflicts with the decisions of this Court or of another court of appeals. Indeed, petitioner cites no other court of appeals decision that even considered this particular question. Standing alone, the absence of any claim of conflict warrants denial of the petition for a writ of certiorari with respect to the second question on which petitioner seeks this Court's review.

b. This Court's review also is unwarranted because the meaning of the pre-2001 version of the money laundering statute is an issue of little, if any, continuing importance. As petitioner acknowledged before the court of appeals, the sort of conduct in which he engaged is clearly covered by the post-2001 version of the statute. See Pet. C.A. Br. 83 ("With the passage of the Patriot Act, conduct of the sort charged in Counts 1 to 8 came within the scope of the money laundering statutes."). It is unlikely that any significant number of future money laundering cases will be brought based on corrupt predicate activity that predated the enactment of a statute that already has been in effect for eight years.

c. In any event, the court of appeals correctly held that petitioner's conduct constituted "specified unlawful activity" under the pre-2001 version of the money laundering statute. Pet. App. 22-27. The version of the statute in effect at the time of petitioner's offenses defined "specified unlawful activity" to include "an offense against a foreign nation involving * * * extortion." 18 U.S.C. 1956(c)(7)(B) and (B)(ii) (1994). "It is a familiar 'maxim that a statutory term is generally presumed to have its common law meaning.'" *Evans* v. *United States*, 504 U.S. 255, 259 (1992) (quoting *Taylor* v. *United States*, 495 U.S. 575, 592 (1990)). This Court has explained that, "[a]t common law, extortion was an offense committed by a public official who took 'by colour

of his office' money that was not due to him for performance of his official duties," and that extortion thus "was the rough equivalent of what we would now describe as 'taking a bribe.'" *Id.* at 260. Here, as in *Evans*, "[i]t is clear that petitioner committed that offense." *Ibid.*

Petitioner has failed to identify any "contrary direction" by Congress. *Evans*, 504 U.S. at 259 (quoting *Morissette* v. *United States*, 342 U.S. 246, 263 (1952)). As the court of appeals correctly observed, "Congress did not qualify the term in any way that suggests that we should read 'extortion' as excluding the common law definition." Pet. App. 25-26. Petitioner observes (Pet. 16) that the term "extortion" is included in the same statutory section as kidnapping and robbery. See 18 U.S.C. 1956(c)(7)(B)(ii) (1994). That fact, however, does not compel a court "to give the term a narrower meaning or one predicated on force or violence." Pet. App. 26. To the contrary, it is equally plausible that Congress grouped those three undefined predicate offenses together because they all were crimes at common law. Petitioner also contends (Pet. 15) that "[t]he term 'extortion' has many different meanings" and that "it has covered different kinds of conduct" "in various statutes and at various times." As the court of appeals noted, however, petitioner has failed to identify "any statute where *Congress* used the word 'extortion' and meant only extortion by violence *or* only extortion under color of official right." Pet. App. 27 (first emphasis added).

Petitioner errs in asserting (Pet. 14-15) that Congress's decision in 2001 to amend the definition "specified unlawful activity" to include "bribery of a public official" demonstrates that his conduct was not covered by the pre-2001 version of the statute. He relies (Pet.

17-18) on statements by Executive Branch officials in seeking legislative changes. But the question is not whether the pre-2001 version of the money laundering statute covered "bribery" in a general sense—which is the issue addressed in the statements quoted by petitioner, see *ibid.*—but whether petitioner's particular conduct constituted "extortion," which was specifically included in the pre-2001 statute.

At any rate, as the court of appeals explained (Pet. App. 26), its interpretation of the term "extortion" in the pre-2001 statutes does not render the 2001 amendment superfluous. "Bribery and extortion under color of official right are not co-extensive," because the "'[b]ribery of a public official' extends to the individual who offers the bribe as well as the public official who accepts the bribe." *Ibid.*; see *ibid.* (explaining that the words "[m]isappropriation, theft, or embezzlement of public funds by or for the benefit of a public official," which also were added by the 2001 amendments, "will also capture conduct not punishable as 'extortion under color of official right' because misappropriation, theft, and embezzlement do not necessarily require the quid pro quo of an official action").

Finally, petitioner cites the "fair warning requirement" discussed by this Court in *United States* v. *Lanier*, 520 U.S. 259 (1997), and appears to invoke the rule of lenity in particular. See Pet. 19 (citing the maxim that "[w]here criminal statutes are reasonably susceptible of two interpretations, the narrower interpretation must be chosen"). As the court of appeals correctly recognized, "[t]he term 'extortion' has an ordinary meaning and it is not ambiguous." Pet. App. 27. The version of the statute in effect at the time of petitioner's offense thus provided more than "a fair warning * * *

of what the law intends to do if a certain line is passed." *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 703 (2005) (citation omitted). There likewise is no reason to resort to the rule of lenity, which is reserved for cases involving a "grievous ambiguity" in the statutory text such that, "after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess at what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
Supreme Court of the United States

PAVEL IVANOVICH LAZARENKO,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1. The government suggests that this Court should deny certiorari because, based on its reversal of the petitioner's other convictions, the Ninth Circuit remanded the case for resentencing. It cites authority showing that Lazarenko could seek certiorari for the currently presented issues after sentencing is completed. (Govt. Opp. at 8-9.)

It is true that petitioner could seek certiorari at the later stage, and that this Court could decline to grant certiorari until that later stage. But an option is not a mandate. Nothing cited by the government suggests that this petition is unripe or that this Court lacks the power to grant it at this stage in the proceedings. This Court, for example, regularly reviews nonfinal decisions "where the petitioner's position, if sustained, would render the decision wholly void" or where review would "serve to hasten or finally resolve the litigation." E. Gressman et al., *Supreme Court Practice* § 4.18 at 282 (9th ed. 2007) (*citing, inter alia*, *American Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372 (1893), and *F. Hoffman-La Roche Ltd. v. Empagram S.A.*, 542 U.S. 155 (2004)). In this case, if petitioner's position is correct, it makes sense, from the standpoint of efficiency, for this Court to declare so now.

Moreover, unlike cases such as *VMI v. United States*, 508 U.S. 946 (1993), the nature of the issues on remand have nothing to do with the issues here

presented. Any alteration in the petitioner's sentence will not affect the merits of the two questions on which certiorari is sought. Thus, while this Court certainly has the power to defer these questions, nothing would be gained by doing so in this case.

2. Certiorari is warranted so that this Court can determine whether the failure to allege an element of an offense in an indictment can constitute harmless error. The government does not deny that the question has split the circuits. Nor does it deny that it is a question of extraordinary importance. Of course, it could not contest these claims, since the government itself sought certiorari on the very same question just a few years ago.

Instead, the government argues that this Court should not grant certiorari because this case does not squarely present the question presented. That argument rests on a series of evasions.

First, the government notes that the Ninth Circuit, in its ruling below, held that the indictment "was legally sufficient." *United States v. Lazarenko*, 564 F.3d 1026, 1034 (9th Cir. 2009). But the Ninth Circuit did not find the indictment to be sufficient because it actually alleged the element – rather, it found the indictment sufficient in large part because it contained enough other information that the defendant would not have been misled about the nature of the charges, and because the petit jury was ultimately instructed on the missing element. *Id.* at 1033-34.

Admittedly, the precise basis for the Ninth Circuit's holding is not easy to discern. Its rationale for denying the petitioner's pleading argument was somewhat muddled. But a lower court should not be able to evade review simply by masking its holding in a series of confusing, competing rationales. And in any event, the stated rationale of the court below entails the conclusion that the omission of an element can be harmless. The Ninth Circuit found it "significant," for example, that the petit jury was instructed on the elements missing from the indictment. *Id.* at 1034. But the only possible way that fact can be significant is that it arguably goes to harmlessness. If the Ninth Circuit had in fact concluded that the indictment already contained all of the essential elements, then any analysis of the petit jury instructions would have been entirely irrelevant.

The government's second evasion involves knocking down a straw man. It argues that a money laundering charge need not allege all of the elements of the predicate offense. (Govt. Opp. at 12.) It made the same argument below, and its argument was accepted by the Ninth Circuit. But the petitioner has never argued that the indictment was defective for failing to set forth *each underlying element* of the predicate offense. His argument is simpler and narrower: The indictment was defective for failing to specify the predicate offense *at all*.

Of great importance, in another context the government has agreed with Lazarenko that the indictment below did not charge extortion as an element

of the money laundering charges. Lazarenko's petition here noted that in a second appeal arising from this prosecution now pending in the Ninth Circuit, the government has joined Lazarenko in opposing a $19 million restitution award granted to Peter Kiritchenko, the alleged victim of the extortion upon which the money laundering charges rested. (*See* Brief of the United States as Appellee in Ninth Circuit Case No. 08-10185.) The government's brief in the restitution appeal asserts that Lazarenko was not even charged with, or convicted of, the extortion of Kiritchenko. (*Id.* at 2; *see also id.* at 25 ["the specified unlawful activity of which Kiritchenko was a victim, *i.e.*, extortion, was not charged in the indictment as a separate offense [and] is not an element of the money laundering offenses . . . "].)

Lazarenko's argument is a syllogism. The major premise, drawn from this Court's jurisprudence, including *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is simply that every fact necessary to the imposition of punishment is an element, and thus must be found by both the grand jury and the petit jury. The minor premise is that when the conduct constituting a money laundering predicate is committed on foreign soil, that conduct must constitute a foreign crime – it must be illegal in the jurisdiction where the conduct takes place. From these two premises flows a conclusion that both the grand jury and the petit jury must find a foreign crime.

Both the government and the Ninth Circuit below have employed evasive rhetoric to avoid addressing the

syllogism, but neither has actually offered a valid reason for denying either premise or the conclusion. And of course, neither the government nor the Ninth Circuit has denied that in this case, the grand jury never found a foreign crime. The only real question is whether the absence of that finding matters – whether it can be held harmless. It is, as this Court has already recognized, a question of extraordinary importance, and it is a question that is squarely presented by this case.

3. Petitioner also seeks certiorari to review the Ninth Circuit's interpretation of the term "extortion" in the money laundering statute. The government argues that it does not much matter if the Ninth Circuit was wrong, because the statute has now been amended to include bribery. (Govt. Opp. at 14.)

The question presented is exceptionally important not because the Ninth Circuit reached the wrong conclusion about the specific issue presented. Rather, the importance lies in the faulty analysis used by the Ninth Circuit to reach its conclusion. The Ninth Circuit's methodology did violence to the usual canons of statutory interpretation and, more importantly, to the fair warning requirement. The fair warning requirement, which includes both the void-for-vagueness doctrine and the rule of lenity, is grounded in the Ex Post Facto Clause and the Due Process Clause. *See United States v. Lanier*, 520 U.S. 259, 266-67 (1997). For each of the separate doctrinal manifestations of the fair warning requirement, the ultimate "touchstone is whether the statute, either

standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 267.

During the late twentieth century, the fair warning requirement fell into a state of virtual desuetude. *See* Antonin Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L. Rev. 581, 583 (1990) (suggesting that most judges do not "do much more than purport to" apply the rule of lenity). That development was of course welcomed by the government. But in just the last few years, the fair warning requirement has shown a renewed vitality as this Court has recognized its critical constitutional significance. *See, e.g., United States v. Santos*, 128 S. Ct. 2020 (2008); *Begay v. United States*, 128 S. Ct. 1581, 1588 (2008) (Scalia, J., concurring); *see also Weyhrauch v. United States*, 129 S. Ct. 2863 (2009) (granting certiorari to determine the scope of the federal "honest services" fraud statute).

What is at stake in this case is not the pre-2001 meaning of the money laundering statute. What is at stake is the meaning of the fair warning requirement. In this case, the Department of Justice itself previously maintained that the statute did not cover the charged conduct at the relevant time. The legislative history of the 2001 amendment makes clear that Congress took the same view. And yet now the Ninth Circuit has held, based solely on this Court's interpretation of the term "extortion" in the Hobbs Act, that a contrary view can be applied retroactively to the petitioner's conduct. The implication is that a

person may be put in prison for making a "mistaken" interpretation that was shared by both the federal executive and legislative branches. If the fair warning requirement is to have any meaning, such a criminal conviction cannot be allowed to stand.

CONCLUSION

For the reasons stated and in the petition, certiorari should be granted on either or both of the important questions discussed in Sections 2 and 3 above.

Dated: October 8, 2009

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